92-391

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

AMPRO FISHERIES, INC.,

Petitioners,

v.

JUDITH YASKIN, Commissioner of Environmental Protection; GEORGE HOWARD, Director, Division of Fish, Game and Wildlife; and BRUCE FREEMAN, Administrator, Marine Fisheries Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the New Jersey Supreme Court err when it upheld a state regulation which was intended to control the navigation of federally licensed fishing vessels in contravention of the maritime Rules of the Road established by Congress?

2. Did the New Jersey Supreme Court err when it held that there was no violation of the Supremacy Clause of the United States Constitution in the exclusion of federally documented and licensed fishing vessels from the inland and ocean waters of the United States by the State of New Jersey?

3. Did the New Jersey Supreme Court err when it held that the States of New Jersey and Delaware were free to ignore the Bi-State Compact entered into between them, ending litigation over fishing rights in Delaware Bay before the United States Supreme Court, which compact was passed by the legislatures of each state, approved by this Court as settlement of the litigation, and passed by Congress?

4. Did the New Jersey Supreme Court err when it held that there was no unreasonable burden on interstate commerce when the effect of the regulation at issue is to exclude all non-New Jersey vessels from the affected zone and to increase the opportunity for the harvest of menhaden by New Jersey vessels?

PARTIES

The parties to this case are Ampro Fisheries, Inc., a wholly owned subsidiary of American Proteins, Inc. The stock of American Proteins, Inc., is privately held.

The respondent is the State of New Jersey, acting through its Commissioner of Environmental Protection and Energy, Division of Fish, Game, and Wildlife, and Marine Fisheries Administration.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

THE OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 127 N.J. 602, 606 A.2d 1099 (N.J. 1992), and appears in the Appendix at A-1. The opinion of the New Jersey Superior Court, Appellate Division, is reported at 247 N.J. Super. 111, 588 A.2d 879 (App. Div. 1991), and appears in the Appendix at A-19.

JURISDICTION

The decision of the New Jersey Supreme Court was rendered on June 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS

U.S. Constitution Art. I, § 8, Cl. 3
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STATEMENT OF THE CASE

This matter was originally brought before the Chancery Division of the New Jersey Superior Court by Ampro Fisheries, Inc., (hereafter referred to as "Ampro") challenging the validity of the New Jersey regulation which excludes Ampro's federally documented and licensed commercial fishing vessels from a zone extending seaward 1.2 miles from the New Jersey coast and from the Raritan, Sandy Hook, and Delaware Bays.

The regulation was adopted by the Commissioner of the New Jersey Department of Environmental Protection (now the Department of Environmental Protection and Energy), through the Division of Fish, Game and Wildlife, and its Marine Fisheries Administration.

The Chancery Division ruled that the challenge should have been taken directly to the Appellate Division

of the Superior Court, and offered to transfer it there. Ampro opted for the dismissal of the Chancery Division action and to bring a new action in the Appellate Division.

The case was briefed and argued in the Appellate Division on February 25, 1991. In the Appellate Division of the Superior Court, Ampro challenged the regulations at issue on the grounds that the restrictions imposed therein violated, *inter alia*, the interstate commerce and supremacy clauses of the United States Constitution and that insofar as the regulations affected fishing rights in the Delaware Bay they were invalid because they violated the 1905 Bi-State Compact between New Jersey and Delaware. These issues, initially raised in Ampro's original brief, were consistently the subject of extensive briefing.

On April 1, 1991, the Appellate Division issued its opinion in the matter specifically ruling on these issues as set forth in its opinion reprinted in full in the Appendix at A-19. The Appellate Division ruled in favor of Ampro on its contention that the regulation at issue violated the 1905 Bi-State Compact because it was not adopted in accordance with the mandate of the compact. The Appellate Division, however, ruled in favor of the State of New Jersey rejecting Ampro's contention that the regulation was in violation of the federal constitution in that the regulation was preempted by federal navigation statutes known as the Rules of the Road, or by the federal licensing and documentation statutes, and was in violation of the commerce clause in that New Jersey was effectively excluding from the fishery a class of vessels which constituted all the non-New Jersey based vessels in the fishery, while expanding fishing opportunity for all the New Jersey based vessels.

Cross-petitions for Certification were filed to the New Jersey Supreme Court. That Court granted the petitions and took the case. Ampro again raised the same constitutional challenges and defended the finding on the issue of the 1905 Bi-State Compact violation, and

again these issues were the subject of extensive briefing. The case was argued before the New Jersey Supreme Court on February 3rd, 1992 and decided on June 4th, 1992.

The New Jersey Supreme Court reversed in part and affirmed in part. That Court specifically ruled on the federal constitutional issues as well as the 1905 Bi-State Compact issue as set forth in its opinion reprinted in full in the Appendix at A-1, et seq. The Court reversed the Appellate Division decision that the regulation was invalid in the Delaware Bay because it violated the 1905 Bi-State Compact; and, affirmed that portion of the ruling upholding the regulation in the Atlantic Ocean and Sandy Hook and Raritan Bays on the basis that it was not violative of the federal constitution. In short, the regulation was upheld in its entirety.

This petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

1. The New Jersey regulation at issue regulates the navigation of vessels on the inland and ocean waters of the United States in contravention of the maritime Rules of the Road adopted by Congress, and thus violates the Supremacy Clause of the United States Constitution.

The history of the regulation at issue in this matter, N.J.A.C. 7:25-22.2(a)2 (A-61) and the opinions of the Appellate Division and the Supreme Court of New Jersey make clear that the purpose of the regulation, which bars commercial menhaden purse seiners access to the primary zone where menhaden are found, is to prevent what is referred to as "spacial conflict" between commercial menhaden purse seiners, which are commercial fishing vessels, federally documented and licensed pursuant to 46 U.S.C. §§ 12101, 12104, and 12108, (A-51, A-53, A-54) and smaller recreational vessels. In the context of this entire case "spacial conflict"

is the euphemism of choice of the New Jersey Department of Environmental Protection (hereafter referred to as "DEP") and its subordinate branches, for avoiding collisions at sea between recreational vessels engaged in sport fishing and the commercial fishing vessels.

To achieve the goal of preventing collisions at sea, there is, of course, an alternative to New Jersey's method of excluding commercial fishing vessels from their principal fishing grounds. The alternative is to enforce the federal law passed by Congress for the avoidance of collisions at sea – the Rules of the Road. (International Regulations for Preventing Collisions at Sea; 33 U.S.C. foll. § 1602, Rules 1-38, Annexes); 33 U.S.C. § 2001, et. seq. (Inland Rules)(hereafter collectively referred to as the "Rules").[1] The International Rules apply in the Atlantic Ocean off the coast of New Jersey. The Inland Rules apply inside the lines of demarcation which generally are the entrances to Sandy Hook and Raritan Bays in northern New Jersey, and Delaware Bay in southern New Jersey.

Reduced to their essentials, the Rules provide that a fishing vessel has the right of way over vessels not engaged in fishing. The commercial menhaden vessels are fishing vessels; the recreational vessels are not. Thus, under federal law, the Congress has provided that in the case of a "spatial conflict" the recreational vessel must give way to the fishing vessel. Looking at the Rules more closely reveals the wisdom behind this Congressional decision. The Rules provide that a vessel fishing with a hook and line is trolling. Trolling is not considered to be fishing under the Rules of the Road. Rule 3(d), 33 U.S.C. foll. §1602 (A-45); 33 U.S.C. §2003(d) (A-47). Fishing vessels, those fishing with nets, trawls or other gear are restricted in their maneuverability and are given the right of way over vessels not so restricted. Rule

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1. This citation is to the entire body of the Rules of the Road. The specific Rules applicable to this case, Rules 3(d) and 18, are included in the Appendix at A-45, A-47, A-49 and A-50.

18, 33 U.S.C. foll. §1602 (A-49); 33 U.S.C. §2018 (A-50). A vessel fishing with a hook and line in the water is not so restricted and, therefore, must give way to the fishing vessel. The menhaden purse seiners fish with long nets, the deployment and working of which restricts the maneuverability of the vessel. The purse seiners, therefore, have the right of way over the trolling recreational vessels.

However, New Jersey does not wish to enforce the federal law. Rather, to favor its recreational interests and avoid the enforcement problems which may exist, the instant regulation was passed to circumvent the problem. If the commercial vessels are entirely excluded from the zone where the fish are found, then the problem ceases to exist. This is the path New Jersey has followed.

The effect of the rule, however, is to adopt a method of controlling vessel traffic (i.e. avoiding collisions at sea) that is at odds with the will of Congress, which has decided, in adopting the Rules, how these very vessel traffic problems will be resolved. Thus, the decision of the New Jersey Supreme Court to uphold the regulations at issue is in direct contravention of the Supremacy Clause of the United States Constitution, Article VI, Section 2 (A-44) as interpreted and articulated by this Court in cases such as *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); and *Gibbons v. Ogden*, 22 U.S. 1 (1824). Those cases specifically held that vessels federally licensed for a particular trade or occupation could not be denied access to the navigable waters of the United States by the parochial and partisan interests of any of the states.

In *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), this Court held that a collision between two pleasure boats was within admiralty jurisdiction because there could not be two separate sets of navigation rules, one for commercial vessels and one for pleasure vessels. The New Jersey Supreme Court, however, would create

two sets of rules, one passed by the Congress, and another that conforms to New Jersey's narrow ideas of how, when, and where federally licensed vessels should navigate to promote the priority of navigational rights for its own recreational vessels. Such disregard for the integrity of the navigation rules, in particular, and the supremacy of federal law, in general, should not be ignored.

This Court should grant the Petition for *Certiorari* and correct the error of the New Jersey Supreme Court, re-establishing the supremacy of the federal Rules of the Road as the statutory system controlling the navigation of vessels on the inland and ocean waters of the United States.

2. The New Jersey regulation at issue excludes federally documented and licensed commercial fishing vessels from the inland and ocean waters of the United States in violation of the Supremacy Clause of the United States Constitution.

The classic case on the Supremacy Clause of the United States Constitution (Article VI, Section 2) (A-44) is *Gibbons v. Ogden*, 22 U.S. 1 (1824). In *Gibbons*, this Court held that a steam boat licensed by the federal government could not be denied the right to trade between New Jersey and New York by the State of New York. Thomas Gibbons, a former governor of New Jersey sought to compete with the monopoly granted by the State of New York to Robert Fulton. This Court held that the federal license issued to Gibbons to trade in interstate commerce carried with it the full power of the federal government. Consequently, no state could deny a vessel the right to do that which the federal government had authorized it to do.

The supremacy power was more recently analyzed in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). In *Douglas*, this Court considered two Virginia statutes that restricted the rights of non-residents to fish

in state waters. The restricted vessels were federally documented and licensed menhaden vessels owned and operated by a New Jersey menhaden fishing company. This Court held that "the license implies, unequivocally, an authority to licensed vessels to carry on the activity for which they are licensed." *Id.*, 431 U.S. at 280. This Court reasoned that the "business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines." *Id.*, 431 U.S. at 285.

While this Court has held that the Supremacy Clause does not prevent the imposition by states of "reasonable, non-discriminatory conservation and environmental protection measures otherwise within their police power" (*Id.* at 277), there is no such motivation for the regulation at issue in this case. The New Jersey Supreme Court has not even attempted to address an environmental or conservation motive for this regulation. Rather, it has acknowledged that the motive of the State of New Jersey in adopting this regulation was to "lessen conflict between menhaden purse-seine fishermen and our own recreational fishermen." *Ampro Fisheries, Inc. v. Yaskin*, 127 N.J. at 616, 606 A.2d at 1106, A-14.

It is ironic that it is now New Jersey, which has had its citizens protected by the provisions of the Supremacy Clause, which attempts to deny to vessels of another state the rights to trade within the parameters of their federal licenses.

This Court should grant the Petition for *Certiorari* and review the decision of the New Jersey Supreme Court which is in conflict with the decisions of this Court establishing the supremacy of federal law, in this case the power of Congress to license commercial fishing vessels to fish for this targeted species freely and without protectionist interference from state governments.

3. New Jersey may not ignore the Bi-State Compact between New Jersey and Delaware which requires that the two states must regulate the Delaware Bay Fishery by concurrent and identical lawmaking.

In 1905, a Bi-State Compact was created between New Jersey and Delaware to partially resolve a twenty-seven year old law suit that was pending before the United States Supreme Court involving fishing rights in the Delaware Bay (the "Compact"). *State of New Jersey v. State of Delaware*, 291 U.S. 361 (1934); Decree Entered, 295 U.S. 694 (1935).[2] The Compact was approved by this Court as settlement of the litigation; enacted by both states, *N.J.S.A.* 52:28-34 to -46 (A-54), 23 *Del. Laws*, Ch. 5, March 20, 1905 (A-67); and was ratified by Congress on January 24, 1907, Chapter 394, 34 *U.S. Stat.* 858 (1907) (A-73). Following ratification by Congress, the Compact became binding in perpetuity upon both states. Article IX of the Compact, N.J.S.A. 52:28-43 (A-60).

The Compact provided for common fishing rights between the low-water tide marks for the citizens of both states, *N.J.S.A.* 52:28-37 (A-57), and established a joint commission to draft uniform laws which would then be passed by both states and would ". . . constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said states." The "laws shall remain in force until altered, amended or repealed by concurrent legislation of the two states." *N.J.S.A.* 52:28-38 (A-58).

On July 17, 1989, New Jersey, in disregard of the Compact, unilaterally adopted the regulations at issue which prohibited purse-seine fishing for menhaden for reduction purposes in the Delaware Bay. The Appellate Division of the Superior Court, in its opinion (A-24), unanimously held that the Compact precluded New

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2. The remainder of the litigation between the two states was not resolved in the Supreme Court until 1934.

Jersey from unilaterally regulating fishing in the Delaware Bay. The Appellate Division concluded that not only was the Compact not subject to unilateral abrogation by either state, but that a state court lacks "the power to abrogate or modify interstate compacts approved by Congress." *Guarini v. State of New York*, 215 *N.J. Super.* 426, 432 (Ch.Div.), *aff'd o.b.*, 215 *N.J.Super.* 293, 294 (App.Div. 1986), *cert. denied*, 484 *U.S.* 817, (1987). The Supreme Court of New Jersey reversed, however, and held that the 1905 Compact did not prohibit New Jersey from unilaterally regulating fishing for menhaden in the Delaware Bay.

Recently, the United States District Court for the District of Delaware, citing the New Jersey Supreme Court's decision, has ruled that Delaware may adopt fishing regulations which conflict with New Jersey's (even where the two states have appointed a bi-state commission to draft a uniform rule) since the Compact is a nullity, uniform laws never having been passed. *The Delaware Watermen's Association, Inc. et al, v. Edwin H. Clark, II, et al.*, Civil Action No. 92-318-SLR, (opinion dated June 19, 1992, by Hon. Sue L. Robinson), (A-25 at A-33 through A-38).

The litigation between New Jersey and Delaware originated from a dispute over fishing rights in Delaware Bay. Such disputes continue. Conflicting regulations on either side of the Delaware Bay prevent coordinated conservation efforts and create bad feelings between the fishing communities in the two states. The Compact was entered into to resolve this problem. The Compact requires the two states to pass uniform laws and, thereafter, to maintain that uniformity. The Compact having been ratified by Congress, neither state can merely walk away from this undertaking, at least not without the approval of Congress. The New Jersey Supreme Court, and now the Delaware District Court, however, have ruled that the Compact is void and of no effect, that conflicts that have engendered litigation in the past, and continue to do so in the present must continue, and that

the years of litigation before this Court were a waste of the time and resources of the citizens of the two states and of this Court itself. Such a result should not be allowed.

This Court should grant the Petition for *Certiorari* and review the decision of the New Jersey Supreme Court on the requirements of the 1905 Bi-State Compact.

4. New Jersey's regulation imposes an unreasonable burden on interstate commerce in that the practical effect thereof is to exclude all non-New Jersey commercial menhaden fishing vessels from a 1.2 mile zone and the New Jersey Bays, while increasing access to the resource by New Jersey's menhaden vessels.

The opportunity to fish has long been recognized as an interest of sufficient importance to warrant constitutional protection, and as such even when States are legislating in areas of legitimate local concerns, they are limited by the Commerce Clause of the United States Constitution when regulating fishing within their boundaries. Article I, Section 8, Clause 3 (A-44); *See*, *Toomer v. Witsell*, 334 U.S. 385, (1948); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 285 (1971). Because menhaden are "articles of commerce", their use cannot be limited to the citizens of one State to the exclusion of citizens of other states. *Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979). When a state statute discriminates against out-of-state citizens in practical effect, a "strict scrutiny" test is to be applied and the State must demonstrate that the statute is narrowly tailored to achieve the purpose it sought to accomplish. *Toomer*, 334 U.S. at 398; *Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979). Where the State fails to demonstrate the existence of a close means-end relationship, the statute must be struck down as violative of the Commerce Clause. State fishery schemes have been held

unconstitutional because the practical effect of the statute was discriminatory and the statute was unable to withstand the strict scrutiny test. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

In this case, prior to New Jersey's adoption of the regulations at issue, no menhaden fishing vessel was permitted to fish for menhaden within 0.6[3] nautical miles from the New Jersey coastline or within 0.6 nautical miles from the shore of the Delaware, Raritan, and Sandy Hook Bays. The former rule did not distinguish between those fishermen who take menhaden for reduction purposes and those fishermen who take menhaden for bait purposes or based on the size of the vessels used. The new regulations, however, create different levels of treatment for menhaden fishing, the practical effect of which discriminates against all nonresident commercial menhaden fishermen.

The regulation at issue, adopted July 17, 1989, prohibit menhaden fishing for reduction purposes closer than 1.2 nautical miles from the Atlantic coastline, and prohibit such fishing entirely in the Delaware, Raritan and Sandy Hook Bays. N.J.A.C. 7:25-22.2(a)2 (A-62). In 1989, and presently, there are no New Jersey vessels involved in the menhaden reduction industry. In 1989, Ampro operated nine vessels in the menhaden fishery in New Jersey for reduction purposes.

The new regulations allow menhaden vessels not more than 90 feet in length to fish for bait purposes to within 0.6 nautical miles from the New Jersey coastline, and to fish in the Bays. N.J.A.C. 7:25-22.3(b)2 (A-64). In

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3. The .6 mile rule was imposed in 1984. That regulation was not challenged by the industry at the time it was imposed, being the result of a compromise between the industry, recreational fishing interests, and the state regulators. Ampro does not concede, as the New Jersey Supreme Court seems to suggest, that the issue is not one of the power to regulate, but merely the degree of regulation. (See A-14).

addition, the new regulations have extended the ability of this class of vessel to fish for menhaden to within 0.3 miles of the shore in Raritan Bay and Sandy Hook Bay. N.J.A.C. 7:25-22.3(b)2 (A-64). It is no accident that all of New Jersey's menhaden vessels are 89 feet or less in length and fish for menhaden for bait.

Since the vast majority of menhaden are found within the 1.2 mile zone[4] from which vessels that fish for menhaden for reduction purposes and those that fish for bait purposes but are over 90 feet in length have been excluded, New Jersey has prevented all commercial fishing vessels except New Jersey's from reaching the core portion of the menhaden fishing grounds. In fact, while New Jersey has greatly restricted all commercial out-of-state vessels from the relevant fishing grounds, it has increased such access to New Jersey vessels. The practical effect of the New Jersey regulations discriminates against those nonresident commercial menhaden fishermen whose boats are longer than 90 feet in length that fish for menhaden for other than bait purposes. This defines the entire class of non-New Jersey menhaden fishing vessels. New Jersey has neatly separated the smaller menhaden fishing vessels owned and operated by New Jersey fishermen, all of whom fish for menhaden for bait, from those larger fishing vessels, owned by non-New Jersey residents, who fish for reduction purposes. The regulations are tailored to treat these New Jersey menhaden fishermen differently and more favorably than the rest of the industry. Under the proper strict scrutiny standard, this discrimination against non-New Jersey vessels violates the protections established by the Commerce Clause. The New Jersey Supreme Court's decision not to strictly scrutinize the regulations and instead to apply a much less demanding test is in direct contravention of this Court's decisions in *Toomer*, *Foster-Fountain Packing*, *Hughes*, and *Douglas*.

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4. In 1988, 90% of Ampro's catch in New Jersey was within 1.25 miles from the shore or in Delaware Bay.

The present case is strikingly similar, in this regard, to *Atlantic Prince, Ltd. v. Thomas C. Jorling, Commissioner of the New York State Department of Environmental Conservation, et al.*, 710 F.Supp. 893, (E.D.N.Y. 1989).

In *Atlantic Prince*, a New Jersey commercial fishing partnership challenged a New York statute which prohibited commercial fishing vessels in excess of 90 feet in length from fishing in New York state waters. New York boats were all 90 feet or less while there were 10 out-of-state vessels that were in excess of 90 feet.[5] Because the statute created a disproportionate burden on out-of-state business and was, therefore, discriminatory in practical effect, the *Atlantic Prince* court strictly scrutinized the statute concluding that the State failed to demonstrate the existence of a close means-end relationship test and declared the law unconstitutional. *Atlantic Prince*, 710 F.Supp. at 896. The *Atlantic Prince* court correctly followed this Court's precedent and held that a state is not allowed to eliminate all out-of-state fishing vessels by the simple expedient of making all those vessels over the size of the largest New York vessel illegal.

Justice Cardozo explained half a century ago that it is the special function of the Commerce Clause to safeguard the national economy from this inherent aspect of local representation. "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. A.F. Seelig*, 294 U.S. 511 (1935).

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5. The record seems to indicate that there was one New York vessel over 90 feet. *Atlantic Prince*, 710 F.Supp. at 897. However, statements in the record also indicate that New York was unaware of that fact when the statute was passed, believing there were *no* New York boats over 90 feet.

Accordingly, the regulation at issue, which is discriminatory in practical effect, imposes an unreasonable burden on interstate commerce and, consequently, must be strictly scrutinized to determine whether the State had an impermissive motive for adopting the regulations as well as whether the regulation meets the means-end test in that it is narrowly tailored to achieve its purported permissible goal. The New Jersey Supreme Court's failure to apply the strict scrutiny test to the subject regulations is in violation of the Commerce Clause as interpreted by this Court.

For the reasons stated above, this Court should grant the Petition for *Certiorari*, and review the decision of the New Jersey Supreme Court under the standards established by this Court in its decisions under the Commerce Clause.

CONCLUSION

Left unreviewed, the New Jersey Supreme Court's opinion stands for the following:

1. That a state is not in violation of the Supremacy Clause of the United States Constitution, Article VI, Section 2, when it adopts a method of controlling vessel traffic that is in contravention with the method which Congress has adopted.

2. That a state is not in violation of the Supremacy Clause of the United States Constitution, Article VI, Section 2, when it refuses to grant federally documented and licensed commercial fishing vessels access to the inland and ocean waters of the United States.

3. That a state may ignore a Bi-State Compact which was approved by the United States Supreme Court, enacted by both states, and ratified by Congress, if it chooses to do so.

4. That a state does not violate the Interstate Commerce Clause when it adopts regulations

which, in practical effect, prevent all out-of-state commercial fishing vessels from reaching the core portion of the fisheries while increasing such access to that state's own vessels.

The proper determination of these issues is crucial, not only to Ampro Fisheries, Inc. in this case, but to the entire commercial fishing industry. The writ should issue.

Respectfully Submitted,

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APPENDIX

SUPREME COURT OF NEW JERSEY
A-62/63 September Term 1991

AMPRO FISHERIES, INC.,

Respondent and
Cross-Appellant,

v.

JUDITH YASKIN, COMMISSIONER OF ENVIRONMENTAL PROTECTION; GEORGE HOWARD, DIRECTOR, DIVISION OF FISH, GAME AND WILDLIFE; and BRUCE FREEMAN, ADMINISTRATOR, MARINE FISHERIES ADMINISTRATION,

Appellants and
Cross-Respondents.

Argued February 3, 1992 – Decided June 4, 1992

On certification to the Superior Court, Appellate Division, whose opinion is reported at 247 *N.J. Super.* 111 (1991).

Rachel Horowitz, Deputy Attorney General, argued the cause for appellants and cross-respondents (*Robert J. Del Tufo*, Attorney General of New Jersey, attorney; *Mary C. Jacobson*, Deputy Attorney General, of counsel).

Edward V. Cattell, Jr. argued the cause for respondent and cross-appellant (*Clark, Ladner, Fortenbaugh & Young*, attorneys).

The opinion of the Court was delivered by O'HERN, J.

This appeal primarily concerns two issues of federal law: (1) whether the interstate Compact of 1905 between New Jersey and Delaware prohibits New Jersey from unilaterally regulating the fishing of menhaden in

the territorial waters of New Jersey in the Delaware Bay, and (2) whether, in any of the territorial waters of the state, the regulations at issue constitute an impermissible burden on interstate commerce.

I

A.

For the purpose of providing a brief history of the menhaden-fishing industry in New Jersey, we draw upon the briefs and appendices of the parties as well as other documentation filed by the Department of Environmental Protection and Energy (DEPE) in legislative hearings.[1]

Since colonial times, the menhaden has engaged the attention of both courts and regulators along the Atlantic coast. In 1889, Massachusetts authorities arrested coastal fishermen who were fishing for menhaden with seine nets in Buzzards Bay. The menhaden fishermen argued that the waters of Buzzards Bay were the waters of the United States and therefore only the United States could regulate seining of menhaden. Massachusetts disagreed and found the fishermen guilty. On appeal, the United States Supreme Court agreed with the Commonwealth, holding that if Congress "does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays." *Manchester v. Massachusetts*, 139 *U.S.* 240, 266, 11 *S. Ct.* 559, 565, 35 *L. Ed.* 159, 167 (1891).

In 1906 and 1909, the Annual Reports of the New Jersey Fish and Game Commission contained complaints, unsubstantiated at that time, that menhaden boats operating too close to shore were interfering with

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1. Much of the information has been drawn from the appendix to *Prohibits The Taking of Menhaden: Hearings on S. 1372 Before the Senate Natural Resources and Agricultural Comm.*, 201st Leg., 1st Sess. (1984).

blue fishing. *See Regulates the Taking of Menhaden: Hearings on A. 3430 Before the Assembly Conservation and Natural Resources Comm.*, 204th Leg., 1st Sess. at app. 77 (1990) [hereinafter *Hearings*].

In 1977, a New Jersey-based menhaden-fleet operator had to invoke the Supremacy Clause to gain access to Virginia's territorial waters. *See Douglas v. Seacoast Prods.*, 431 *U.S.* 265, 97 *S. Ct.* 1740, 52 *L. Ed.* 2d 304 (1977).

Despite its commercial value, most New Jerseyans have undervalued the menhaden. To them it is "moss bunker" or "bunker," an inedible and sometimes unwelcome visitor to our rivers and estuaries. In New Jersey, a recreational fisherman expressed his changing perception of this fish:

> As a boy on the beach, I had a strong disdain for the bunker fleet. To me they were responsible for poor fishing, for the destruction of bluefish, stripers and weaks and for depletion of the prey upon which the sportfish existed. I held this belief for many years until I began to hear arguments on the other side. These arguments from my opponents were supported by facts and figures while I was totally unable to come up with any proof to justify my stand. Believe me, I did research on the subject but found nothing. I was forced to concede that what I had believed all along was based largely on the psychological effect caused by seeing the bunker boats fishing close to shore and nothing more.

[*Hearings*, *supra*, at app. 34.]

This case tests the "facts and figures" adduced to justify the State's regulation of the menhaden fleets.

B.

Plaintiff, Ampro Fisheries, Inc. (Ampro), is a commercial fishing company with its principal place of business in Virginia. Ampro operates sixteen fishing

vessels. All of those vessels are federally licensed to fish for menhaden, and nine are also licensed by the State of New Jersey for the taking of menhaden. Each of those vessels is from 155 to 187 feet in length. The company owns processing plants in Virginia, North Carolina, and on the Gulf of Mexico.

Menhaden or "moss bunkers" are a member of the herring family and are found along the Atlantic and Gulf Coasts of the United States. They spawn in the ocean in every month of the year in some part of their range. The young make their way into estuaries where they grow rapidly. In the fall, they move south and off-shore, and are seldom seen during the winter months.

The menhaden fishery forms the basis for the United States' largest commercial fishery in terms of pounds landed. In 1983, forty-six percent of the commercial-fishery catch in the United States consisted of menhaden and was valued at $36.9 million. Currently, the catch is not used for human food. Although Native American Indians used the menhaden to fertilize their corn and other crops, it is now too valuable for that use. A small quantity is used for bait, but most of the catch is reduced to fish meal, oil, and a liquid by-product. The meal and by-product are used as a protein supplement in livestock feed, while the oil is used in the manufacturing of various products, including paint, linoleum, cosmetics, and margarine.

By far the largest part of the harvest is taken by purse seines. In purse seining a large vessel of 70 to 200 feet generally carries two purse boats, each about thirty-six feet in length. The net employed is approximately 1,000 to 1,400 feet long. Aircraft that accompany the vessels spot menhaden schools. When a good-sized school is located, the purse boats are lowered into the water. One-half of the purse seine is loaded into each of the two boats and they proceed, side by side, laying out the net toward the school. As they near the school, they move apart and begin laying out the net. They lay the net around the school from opposite sides until they

meet. When the two ends are joined and the school is surrounded, the bottom of the net is closed or "pursed." At that point, the purse boats begin to haul in the nets. The large vessel then joins the purse boats, and the three vessels form a triangle with the net between them. After a large hose has been lowered into the net, the fish are pumped aboard the large vessel. During that process, marine fisheries regulators can determine the extent to which the purse-seine operation harvests other fish.

Because of the menhaden's great importance, with the aid of state and federal fisheries scientists, the Atlantic States Marine Fisheries Commission, an organization created to improve the use of our Atlantic coast fisheries resources, has developed a plan to achieve the greatest continuing yield for each area by determining the age at which menhaden should be harvested and eliminating other restrictions which do not contribute to the management goal.

C.

At issue in this case is the effect of off-shore regulations on the harvest of menhaden. Ampro contends that the vast majority of menhaden is within 1.2 miles of the shoreline. Furthermore, plaintiff argues that for many years protectionist interests favoring Seacoast Products, Inc. (Seacoast or Seacoast Products), then based in Belford on Sandy Hook Bay, permitted menhaden fishing for industrial-production purposes without restriction in the Atlantic Ocean and Delaware, Raritan, and Sandy Hook Bays. After the Seacoast plant ceased operation in 1982, New Jersey restricted the harvest of menhaden in New Jersey waters by regulations adopted in 1983. Those regulations provided that menhaden fishermen could fish for menhaden using purse seines not closer than 0.6 nautical miles from the New Jersey coastline and in the Delaware, Raritan, and Sandy Hook Bays.

On July 17, 1989, the DEPE adopted the regulations at issue here. Those regulations prohibit purse-seine fishing of menhaden for other than bait purposes closer than 1.2 nautical miles from the Atlantic coastline. *N.J.A.C.* 7:25-22.2(a)2. Fishing for menhaden for industrial-production purposes in the Delaware, Raritan, and Sandy Hook Bays, which was previously permitted, is now prohibited by the regulations. At the same time, the DEPE adopted regulations that restrict purse-seine bait-fishing of menhaden to vessels ninety feet in length or less and not closer than 0.6 nautical miles from the shoreline in the Atlantic Ocean and Delaware Bay. Those regulations further prohibit that type of fishing closer than 0.3 nautical miles from the shoreline in the Raritan and Sandy Hook Bays. *N.J.A.C.* 7:25-22.3(b)2 and 3.

In February 1990, Ampro attacked the regulations, arguing that they violated the Commerce, Privileges and Immunities, and Supremacy Clauses of the federal Constitution; were not reasonably related to the public health and safety; and were *ultra vires*. In addition, Ampro argued that the 1905 Compact between New Jersey and Delaware made the regulations invalid as they applied to the Delaware Bay.

The Appellate Division upheld the general validity of the regulations, finding that they did not violate any constitutional provision and were not preempted by federal law. However, the Appellate Division held that the regulations were invalid as applied to the Delaware Bay because the 1905 Compact precluded "the power of this state unilaterally to regulate fishing in Delaware Bay." 247 *N.J. Super.* at 114.

We granted both parties' petition for certification. 126 *N.J.* 340 (1991). We now reverse so much of the Appellate Division's judgment as concerns the 1905 Compact between Delaware and New Jersey.

II

The Compact Issue.

A.

The 1905 Compact between Delaware and New Jersey, codified at *N.J.S.A.* 52:28-34 to -46, was created with the approval of Congress. 34 *Stat.* 858 (1907). The purpose of the Compact was to resolve a long-standing boundary dispute between the states regarding a twelve-mile arc around the Town of New Castle on the Delaware River. The Compact was also designed to resolve a twenty-seven year-old law suit that was pending before the United States Supreme Court involving Delaware fishing regulations. *N.J.S.A.* 52:28-34. The dispute began in 1872 with Delaware authorities arresting twenty-two New Jersey fishermen on the Delaware River for fishing without a Delaware license. The fees demanded of New Jersey fishermen were greater than those charged to citizens of Delaware. *The State of the Question of Jurisdiction and Boundary Between New Jersey and Delaware*, A.D. 1873 (1873) (on file in the State Library).

The Compact provided that the inhabitants of each state should enjoy a common right of fishery in the waters of the Delaware River between the low-water marks on each side of the river with the exception of previously-granted private rights of fisheries, *N.J.S.A.* 52:28-37, and established a joint commission to draft laws to "regulate the catching and taking of fish in the Delaware river and bay between said two states." *N.J.S.A.* 52:28-38.

The Appellate Division concluded that the Compact preempted any unilateral action by the State of New Jersey. We disagree. By its terms, the Compact pledged the member states to adopt uniform regulations only if the commissioners from each of the states recommended uniform regulations to them. Specifically, the Compact states only "[u]pon the adoption and passage of

said laws so recommended by the respective legislatures of said two states, said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said states." *N.J.S.A.* 52:28-38. Although the commissioners recommended, and the states have adopted, certain fishing regulations, they did not recommend purse-seine regulations with respect to menhaden.

B.

We have recently reviewed the law concerning such an interstate compact. *Eastern Paralyzed Veterans Ass'n v. City of Camden*, 111 *N.J.* 389 (1988). Those compacts are not the product of a single state, but rather of both states. Thus, "[i]t follows that neither creator state can unilaterally impose additional duties, powers or responsibilities" that infringe on the compact. *Nardi v. Delaware River Port Auth.*, 490 *A.*2d 949, 950 (Pa. Commw. Ct. 1985) (citing *C.T. Hellmuth & Assocs., Inc. v. Washington Metro. Area Transit Auth.*, 414 *F. Supp.* 408 (D. Md. 1976); *Bell v. Bell*, 83 *N.J.* 417 (1980)). Only when the compact recognizes the unilateral jurisdiction of the compact states may the compact's agenda be subject to single-state jurisdiction. *Eastern Paralyzed Veterans Ass'n.*, *supra*, 111 *N.J.* at 399.

On the other hand, courts have regularly held that a bi-state agency may be subject to complementary or parallel state legislation that does not intrude on the mission of the agency. *Id.* at 400. The simplest example is that bi-state agency employees must observe stop lights in New Jersey just as they would be required to in Pennsylvania, even though neither state had adopted such regulations within the framework of the compact. *Ibid.* (citing *Nardi v. Delaware River Port Auth.*, *supra*, 490 *A.*2d at 952 n.10).

C.

With that background, we first note that there is, in the words of the Attorney General, a "condition-

precedent" to any claim of exclusive jurisdiction under the Compact, namely, that the commissioners of both states first must have agreed to recommend a joint regulation of a particular species of fish that would constitute the "sole laws" contemplated by the Compact. *N.J.S.A.* 52:28-38. The joint commission did propose and New Jersey did enact such laws with respect to certain species and fishing practices, *L.* 1907, *c.* 131, but Delaware did not. *See N.J.S.A.* 52:28-38 Historical Note. Absent such a concurrence, each state presumably would retain the right, at least within its territorial waters, to regulate the taking and catching of fish in the river. *N.J.S.A.* 52:28-38. *See Nicoulin v. O'Brien*, 248 *U.S.* 113, 39 *S. Ct.* 23, 63 *L. Ed.* 155 (1918) (Kentucky was not prohibited from legislating to protect the fish within its boundaries simply because it had entered into a compact with Indiana that provided for concurrent jurisdiction); *State v. Mick*, No. 83-05-0092-93 (Del. Super. Ct. May 2, 1984) (1905 Compact did not require passage of uniform laws unless recommended by commissioners). We also note that the decree of entitlement to the river bed within the twelve-mile arc around Newcastle entered by the Supreme Court in 1935, *New Jersey v. Delaware*, 295 *U.S.* 694, 55 *S. Ct.* 907, 79 *L. Ed.* 1659 (1935), has no disabling effect on New Jersey's regulation of the eastern shore waters of the Delaware. Absent any restraints created by the Compact, New Jersey exercises its sovereign powers fully in those waters. *See State v. Federanko*, 26 *N.J.* 119, 127-29 (1958) (gambling offense on New Jersey side of Delaware River found amenable to our criminal jurisdiction although the United States Supreme Court found State of Delaware owned the river bed).

In addition, we take note of the fact that the purse-seine regulations do not directly conflict with any regulations enacted by the State of Delaware. *See Del. Code Ann.* tit. 7, §919(b) (1991). They appear in that sense to be complementary or parallel. Because New Jersey's position with respect to purse seining is in no way

inconsistent with that of Delaware, there is, as the Attorney General puts it, no current dispute between Delaware and New Jersey, but simply a dispute between New Jersey and Ampro.

III

The Commerce Clause Issue

A.

There can be no doubt, however, that plaintiff's fishing rights are protected by the Commerce Clause. The states do not have full-fledged property interests in the wildlife within their boundaries. *See Missouri v. Holland*, 252 *U.S.* 416, 40 *S. Ct.* 382, 64 *L. Ed.* 641 (1920) (treaty may override state's authority to regulate migratory birds). Even when legislating in areas of legitimate local concerns, such as environmental protection and resource conservation, states are nonetheless limited by the Commerce Clause. *See Lewis v. BT Inv. Managers, Inc.*, 447 *U.S.* 27, 100 *S. Ct.* 2009, 64 *L. Ed.* 2d 702 (1980) (Florida statute providing that out-of-state banks could not own businesses within the state furnishing investment advisory services violated the Commerce Clause).

Courts have long recognized the opportunity to fish as an interest of sufficient importance to warrant constitutional protection and in some cases have struck down laws that were found to be discriminatory. *See Toomer v. Witsell*, 334 *U.S.* 385, 68 *S. Ct.* 1156, 92 *L. Ed.* 1460 (1948) (South Carolina laws discriminating against out-of-state commercial fishermen struck down as violative of both the Commerce and Privileges and Immunities Clauses). The analysis is essentially the same under either guarantee. "The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines." *Douglas v. Seacoast Prods.*, *supra*, 431 *U.S.* at 285, 97 *S. Ct.* at 1752, 52 *L. Ed.* 2d at 320. However, the Court explained that "reasonable and

evenhanded conservation measures, so essential to the preservation of our vital marine sources of food supply, stand unaffected by our decision." *Id.* at 287, 97 *S. Ct.* at 1753, 52 *L. Ed.* 2d at 321.

The principles of decision are settled:

> In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142, 25 *L. Ed.* 2d 174, 90 *S. Ct.* 844 (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes v. Oklahoma*, 441 *U.S.* at 336, 60 *L. Ed.* 2d 250, 99 *S. Ct.* 1727, that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.
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> [*Maine v. Taylor*, 477 *U.S.* 131, 138, 106 *S. Ct.* 2440, 2447, 91 *L. Ed.* 2d 110, 120-21 (1986).]

B.

Plaintiff contends that the regulation in this case discriminates against interstate commerce either "on its face or in 'practical effect.' " We disagree. On its face, New Jersey's regulation does not effect simple protectionism but regulates even-handedly. That regulation is

therefore unlike statutes discriminating against interstate commerce, which the Court has consistently struck down, *e.g.*, *Wyoming v. Oklahoma*, 502 *U.S.* ____, 112 *S. Ct.* 789, 117 *L. Ed.* 2d 1 (1992) (Oklahoma statute requiring Oklahoma electric generating plant fired by coal to burn a mixture with at least ten percent Oklahoma-mined coal); *Lewis v. BT Inv. Managers, Inc.*, *supra*, 447 *U.S.* 27, 100 *S. Ct.* 2009, 64 *L. Ed.* 2d 702 (Florida scheme prohibiting banks with principal offices out of state from owning investment advisory services); *Hughes v. Oklahoma*, 441 *U.S.* 322, 99 *S. Ct.* 1727, 60 *L. Ed.* 2d 250 (1979) (Oklahoma statute prohibiting the transport or shipment outside the state of natural minnows seined from waters within the state); *Philadelphia v. New Jersey*, 437 *U.S.* 617, 98 *S. Ct.* 2531, 57 *L. Ed.* 2d 475 (1978) (New Jersey statute prohibiting import of solid and liquid wastes into the state); *Hunt v. Washington State Apple Advertising Comm'n*, 432 *U.S.* 333, 97 *S. Ct.* 2434, 53 *L. Ed.* 2d 383 (1977) (North Carolina statute requiring all apples sold or shipped into the state be graded in a particular manner that in effect imposed additional costs on Washington but not on North Carolina apple shippers). *Hunt* is instructive because although facially neutral, the statute required all apples sold in closed containers to bear the U.S.D.A. grade, which was the grading system used by North Carolina, thus imposing additional costs on out-of-state apple shippers. Those shippers already bore the additional expenses of their own state's grading system.

Merely because plaintiffs' vessels are from out of state does not mean that the regulation has a discriminatory effect. The regulation does not place Ampro at a competitive disadvantage in relation to in-state fishing interests. To illustrate the point, we need consider the argument only as if the regulation had been passed while Seacoast was still operating from its New Jersey plant in Belford but had later withdrawn (as it did when supposedly acquired by Zapata Haynie) to southern waters. Under those circumstances, the regulation

would affect only out-of-state fishermen. This effect of course would not be discriminatory. Thus, plaintiff's reliance on *Atlantic Prince, Ltd. v. Jorling*, 710 *F. Supp.* 893 (E.D.N.Y. 1989), is misplaced. In that case, New York's ban on squid trawlers in excess of ninety feet (when New York fleets operated only smaller vessels) discriminated against the out-of-state fleets because it denied access to the very fishing stocks that New York fleets were continuing to harvest with their smaller vessels. Such a regulation addresses no "reasonable and evenhanded conservation measure[]." *Douglas v. Seacoast Prods.*, *supra*, 431 *U.S.* at 287, 97 *S. Ct.* at 1753, 52 *L. Ed.* 2d at 321. Rather, plaintiff is actually arguing that the regulation has a discriminatory purpose.

We acknowledge that in times past legislators sponsoring a two-mile ban on purse seining have noted the departure from the menhaden industry of the Belford-based Seacoast Products and their support may have suggested a disregard of the legitimate interests of foreign-state fishing fleets. However, the Division of Fish, Game, and Wildlife of the DEPE has never displayed any discriminatory attitude toward the foreign fleets. In fact, DEPE originally opposed the proposed 1.2-mile ban, see *S.* 1372, 201st Leg., 1st Sess. (1984); *S.* 3395, 201st Leg., 2nd Sess. (1985), and later opposed a 2-mile ban. *Hearings*, *supra*, app. at 18. In the equal-protection analysis the Supreme Court will assume that the objectives articulated by an administrative body are the actual purposes of a regulation unless an examination of the circumstances forces the Court to conclude that the valid state purposes "could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 *U.S.* 636, 648 n.16, 95 *S. Ct.* 1225, 1233 n.16, 43 *L. Ed.* 2d 514, 525 n.16 (1975) (citations omitted). That analysis can be applied here. A review of the administrative history of the regulation supports the conclusion that valid state purposes were a goal of the regulation.

C.

Because New Jersey's regulation does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the regulation is "clearly excessive in relation to the putative local benefit." *Pike v. Bruce Church, Inc.*, *supra*, 397 *U.S.* at 142, 90 *S. Ct.* at 847, 25 *L. Ed.* 2d at 178 (citing *Huron Portland Cement Co. v. Detroit*, 362 *U.S.* 440, 443, 80 *S. Ct.* 813, 815, 4 *L. Ed.* 2d 852, 856 (1960)).

At the outset we note that the states have traditionally been given latitude to regulate fishing in their coastal waters. *See*, *e.g.*, *C.J. Hendry Co. v. Moore*, 318 *U.S.* 133, 63 *S. Ct.* 499, 87 *L. Ed.* 663 (1943) (state may require forfeiture of net used in violation of fishing regulations); *Manchester v. Massachusetts*, *supra*, 139 *U.S.* 240, 11 *S. Ct.* 559, 35 *L. Ed.* 159 (state may prohibit menhaden fishing in bay).

With that in mind, we turn to the administrative record before the DEPE. That record contains several factors that amply support the benefit of the regulations and the reasonableness of the burden. First, the industry never suggested that any form of regulation would be unconstitutional because of the absence of New Jersey fleets. Rather, the position of the industry was that the 0.6 nautical mile regulation, which became effective in 1983, was sufficient to control menhaden fishing and that increasing it to 1.2 nautical miles was unnecessary. Thus, the debate was about the distance from shore rather than the power of the State to regulate. In revising related regulations in 1984, Commissioner Hughey explained the need to eliminate "spatial conflict," namely, collisions occurring between large bunker boats and in-shore sport fishermen who are said to contribute $600 million a year to the economy of New Jersey. He said: "The primary purpose of the regulations * * * is to lessen conflict between menhaden purse-seine

fishermen and our own recreational fishermen." *Emergency Regulations Adopted for Purse-Seine Fishing of Menhaden, Department of Environmental Protection News*, July 12, 1984.

Second, there was evidence that bluefish, striped bass, and weakfish, although not captured within the nets, will leave the area when the purse seiners reduce the in-shore bunker school, because there is nothing for them to feed on. Because the primary feeding stocks of major game fish, mainly the striped bass, live in bay mouths, a speaker at the public hearing on the amendment to the regulations suggested that by assuring that there is better bait fish in the form of menhaden, the breeding grounds would be enhanced without destroying the menhaden industry. In contrast, the primary zone for menhaden fishing is approximately three miles along the coastline. So rather than exclude menhaden fishing entirely from the primary market, a 1.2 nautical mile limit would restrict fishing only in a portion of the primary zone.

Finally, the record before the DEPE also indicated that the states of Maryland, Delaware, North Carolina, South Carolina, New Hampshire, and New York had enacted comparable restrictions on bunker boats. *See, e.g., Del. Code Ann.* tit. 7, §919(b) (1991) (prohibiting menhaden fishing within three miles of the shore); *N.Y. Envtl. Conserv. Law* §13-0333(4) (McKinney 1984) record in this case amply demonstrates that the New Jersey regulators had legitimate reasons, apart from their origin, to treat the out-of-state menhaden fishermen as they did. Indeed, they were not treated differently from anyone else. New Jersey should not be prevented from correcting in-shore problems simply because New Jersey fleets have withdrawn from the state. If a developed record showed that New Jersey imposed a clearly excessive burden on interstate commerce, we could not foreclose a renewed challenge to the reasonableness of the New Jersey regulations. That

record should include, as well, a comparison with the burdens on the harvest elsewhere.

We find no merit in Ampro's final constitutional challenge. Because Congress has not expressed its intent to displace state action in this field, the Supremacy Clause does not prevent the DEPE from regulating in this area.

IV.

The final issue pertains to state administrative law, specifically, Ampro's contention that the regulations are *ultra vires*. The Marine Fisheries Management and Commercial Fisheries Act, *N.J.S.A.* 23:2B-1 to -18, recognizes that fishery resources contribute to recreation as well as to other uses and that the distribution and allocation of fishery resources must be assigned. *See N.J.S.A.* 23:2B-2. The Act allows the Marine Fisheries Council to study "economic, social and ecological data relating to the operation of the marine fisheries program." *N.J.S.A.* 23:2B-5h. The Act further authorizes regulations that may

> [p]rohibit, limit, condition, require or establish the use of specified types of fishing gear; the size, number and quantity of specific species that may be taken; the areas to be opened or closed to their taking, the time and manner of their taking; and may prescribe such other limitations, conditions, requirements, or restrictions as is necessary and appropriate to the policy and purposes of this act.
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> [*N.J.S.A.* 23:2B-6a.]

Those regulations are well within the scope of the enabling act. They address precisely the "reasonable and evenhanded conservation measures, so essential to the preservation of our vital marine sources of food supply." *Douglas v. Seacoast Prods.*, *supra*, 431 *U.S.* at 287, 97 *S. Ct.* at 1753, 52 *L. Ed.* 2d at 321.

A delicate balance must be maintained to preserve the resources of the sea for this and future generations.

To return to the previously-cited words of the recreational fisherman:

> Fish are a common resource. They belong to no one sport or commercial. We have no more right to believe they belong to us than commercial men do in believing they are theirs. Long before our country was born the colonists fished together – recreational and commercial. This is the way it has been and should be. There is enough for us all, and in this spirit we should each respect the rights of the other. In my opinion, a fisherman is a fisherman, and what hurts one hurts us all.

[*Hearings*, *supra*, at app. 34.]

Maintaining the balance between the rights of those who pursue the fish and the preservation of the fish has been primarily delegated to the Marine Fisheries Council. The Atlantic States Marine Fisheries Commission should be empowered to resolve any undue interference by one of the states with the common resource. As we have seen, many of our sister states have purse-seine regulations similar to those enacted by New Jersey's Marine Fisheries Council. For instance, Delaware bans the fishing of menhaden within three miles of the shore, *Del. Code Ann.* tit. 7, §919(b) (1991); New York restricts operating distances of menhaden vessels between the shoreline and buoy markers in certain areas, *N.Y. Envtl. Conserv. Law* §13-0333(4) (McKinney 1984); Maryland prohibits fishing with purse nets for any reason in the tidal waters of the state, *Md. Nat. Res. Code Ann.* §4-710 (1991); and North Carolina prohibits the taking of menhaden with purse seines in the Atlantic Ocean within a delineated area and further prohibits menhaden fishing within one mile of the shoreline except from January 16 to May 14. *N.C. Gen. Stat.* §113-182 (1990); *N.C. Admin. Code* tit. 15A r.03R.0011 (Jan. 1991). Absent evidence of economic protectionism directed at out-of-state fishing fleets or clear abuse of authority, courts do well to recognize that the complex regulation

of fisheries resources is within the primary jurisdiction of the councils established under state and federal law.

The judgment of the Appellate Division is reversed in part and affirmed in part. The validity of the regulations is affirmed.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, Garibaldi, and Stein join in this opinion.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4562-89T5

AMPRO FISHERIES, INC.,

Appellant,

v.

JUDITH YASKIN, COMMISSIONER OF ENVIRONMENTAL PROTECTION; GEORGE HOWARD, DIRECTOR, DIVISION OF FISH, GAME & WILDLIFE; and BRUCE FREEMAN, ADMINISTRATOR, MARINE FISHERIES ADMINISTRATION,

Respondents.

Argued February 26, 1991 Decided April 3, 1991

Before Judges Pressler, Deighan and Baime.

On appeal from the New Jersey Department of Environmental Protection.

Edward V. Cattell, Jr. argued the cause for appellant (Clark, Ladner, Fortenbaugh & Young, attorneys; Mr. Cattell and Douglas K. Walker on the brief; Mr. Cattell on the reply brief).

Rachel Horowitz, Deputy Attorney General, argued the cause for respondents (Robert J. Del Tufo, Attorney General, attorney; Mary C. Jacobson, Deputy Attorney General, of counsel; Ms. Horowitz on the brief).

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

This appeal challenges the July 1989 action of the Division of Fish, Game and Wildlife, Department of

Environmental Protection, in amending *N.J.A.C.* 7:25-22.1 and -22.2 and adopting 7:25-22.3 and -22.4, the regulations governing Atlantic menhaden fishing in New Jersey's territorial waters. More particularly, Ampro Fisheries, Inc., a foreign corporation whose principal place of business is in Virginia, attacks the validity of those provisions of the regulations which prohibit purse seine fishing for menhaden for purposes other than for bait in the Delaware, Raritan and Sandy Hook Bays and within 1.2 nautical miles of shore. *N.J.A.C.* 7:25-22.2(a)(2). The regulations bar purse seine fishing of menhaden for bait within .6 nautical miles of shore and permit limited incursion for bait fishing into the bays. *N.J.A.C.* 7:25-23.3.

Ampro, whose purse seine menhaden fishing operation is affected by the 1.2 mile limit and bay preclusion, contends that the regulations, insofar as they affect the waters of Delaware Bay, are invalid because they contravene the Compact of 1905 by which New Jersey and Delaware agreed to joint regulation of fishing in that body of water. *See N.J.S.A.* 52:28-34, *et seq.*; *Del. Code Ann.* tit. 23; 34 *U.S.* Stat. 858 (1907). Ampro also argues that the restrictions violate the interstate commerce, privileges and immunities, and supremacy clauses of the United States Constitution and that they are *ultra vires* and constitute an invalid use of the police power.

We agree with Ampro that the 1905 Compact precludes the power of this state unilaterally to regulate fishing in Delaware Bay. The regulations must consequently be modified in that respect. We reject, however, as without merit, its remaining challenges to the regulations.

Our consideration of the regulations requires a brief contextual reference. Atlantic menhaden are a plentiful Atlantic Ocean fish which migrate in schools from North Carolina to Maine. Although they are neither a sport nor a food fish, they are pursued by commercial fishing operators for two primary purposes: bait and reduction. The reduction process produces fish oil and fish meal,

which have significant commercial applications. Typically, vessels engaged in obtaining menhaden for reduction purposes are 165 to 220 feet long, weigh approximately 190 tons, and use purse seines which are 1200 feet long by 90 feet deep. They rely on spotter aircraft to locate schools, which are frequently but not exclusively, within 1.2 nautical miles of shore. Historically, New Jersey has issued about 16 menhaden reduction licenses annually. *See N.J.S.A.* 23:3-51 and -52. There has been no New Jersey-based company taking menhaden for reduction since the early 1980's. Menhaden fishing for bait is undertaken by much smaller vessels, typically less than 90 feet, which use much smaller nets.

According to the record, there is a long history of social and spacial tensions in the near-coastal Atlantic waters between recreational sport fishing boats and commercial menhaden vessels, which have led to the adoption by most Atlantic coastal states of some sort of commercial-fishing restrictions. New Jersey's first regulation of menhaden fishing was responsive to a serious conflict between 16 menhaden vessels and a group of recreational boaters in 1983. The regulation adopted the following year, *N.J.A.C.* 7:25- 22.1 and -22.2, made no distinction between reduction and bait fishing, barring all purse seine menhaden fishing within .6 nautical miles of shore and on weekends and holidays. Consideration of the regulatory issue continued, however, and in 1987 the New Jersey Marine Fisheries Council which advises DEP, *see N.J.S.A.* 23:2B-1, *et seq.*, particularly 23:2B-4, appointed a menhaden subcommittee. It was this subcommittee which conceived of the scheme of separately regulating the bait and reduction operations.

Following considerable debate and discussion involving representatives of all affected groups, public and private, the present regulations were proposed, a public hearing held, and the regulations adopted. DEP's comments accompanying both its proposal and adoption, 21 *N.J.R.* 107 (1989) and 21 *N.J.R.* 2035 (1989), respectively, indicate that while the regulations would have a

negative impact on the menhaden reduction industry, the same quantity of fish could be caught with additional fishing time. On the other hand, the DEP was of the view that the regulations would have the positive effect of removing "large-scale vessels operating large nets from an already crowded near-shore fishing area" and reducing "spacial conflicts with coastal navigation." 21 *N.J.R.* 107. DEP also concluded that the regulations, in their totality, including their clean-up provisions, would benefit coastal communities, would provide additional protection for the menhaden stock, especially juvenile menhaden, and would enable predatory fish and birds to feed more easily within the protected zone. Finally DEP anticipated economic benefit for other industries, including commercial crabbers and lobstermen and suppliers of recreational fishing equipment and bait.

Leaving aside for the moment the Delaware Bay problem, we are satisfied that the regulations ore otherwise valid and that Ampro has failed in its heavy burden of overcoming the presumptive validity and reasonableness which attends administrative regulation. *See, e.g., Bergen Pines Hosp. v. Department of Human Serv.*, 96 *N.J.* 456, 477 (1984). Clearly, the regulations are well within the scope of the enabling statutes and consistent with its legislative purpose and policy. *See N.J.S.A.* 23:2B-1 and particularly *N.J.S.A.* 23:2B-2 and -6. The *ultra vires* argument is therefore meritless. Moreover, the disparate treatment of bait and reduction enterprises is based upon rational classification supported by the record as is the extent of the restrictions. Moreover, the record supports the reasonableness of the restriction imposed in terms of the problem to be addressed, the extent of the legislative power to address it, and the need to accommodate the panoply of competing interests. We therefore reject Ampro's "police power" argument as well.

With respect to Ampro's privileges and immunities claim, we note first that as a corporate litigant, that argument is not available to it. Corporations have been

consistently held to be excluded from the protections of Art. IV, section 2, clause 1 of the United States Constitution. *See, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 *U.S.* 648, 656, 68 *L. Ed.* 2d 514, 522-523 (1981). Beyond that, the regulations are, on their face, resident-neutral. Any New Jersey resident choosing to enter the menhaden reduction business will be subject to the same restrictions as now apply to the present out-of-state fleet.

Nor do we find merit in the commerce clause argument Ampro advances under Article I, section 8, clause 3 of the United States Constitution. We note that this court has recently considered the effect of that clause on the validity of administrative regulations in *In the Matter of Allegations of Violations By Recycling & Salvage Corporation*, ____ *N.J. Super.* ____ (App. Div. 1991) (approved for publication February 21, 1991). We need not retread the ground so carefully covered by Judge Michels. It suffices to repeat the principle that "a legitimate nondiscriminatory exercise of police power is not barred by the commerce clause because it might indirectly affect interstate commerce." (slip opinion at 16-17). This is particularly so where the weight and nature of the state's regulatory concerns outweigh the incidental effect of its regulatory scheme on interstate commerce. *See Matter of Fiorillo Bros. of N.J., Inc.*, 242 *N.J. Super.* 667, 679 (App. Div. 1990). We are convinced that the regulations here constitute a legitimate, nondiscriminatory exercise of police power substantially advancing a legitimate state interest which, particularly in view of the complex of other coastal states' restrictions, affects interstate commerce only indirectly and incidentally.

Ampro's supremacy argument under Art. VI, section 2, is based on federal navigational laws and federal enrollment and licensing laws which, it claims, preempt state regulation of the activities of federal licensees in coastal waters. While a total prohibition of menhaden fishing in state waters might well run afoul of Ampro's

federally licensed rights, *see Douglas v. Seacoast Products. Inc.*, 431 *U.S.* 265, 52 *L. Ed.* 2d 304 (1977), the regulations here are not prohibitory but only regulatory, constituting a reasonable and nondiscriminatory conservation and environmental protection scheme not substantially inconsistent with Ampro's federally-accorded rights.

We turn now to the Delaware Bay issue. DEP attempts to justify New Jersey's unilateral action in excluding menhaden reduction fishing in that body of water by arguing that the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws. We must reject that argument. The Compact, as we have noted, was enacted by both states and approved by an act of Congress. Not only is it not subject to unilateral abrogation by either state but it is also clear that a state court lacks "the power to abrogate or modify interstate compacts approved by Congress." *Guarini v. State of New York*, 215 *N.J. Super.* 426, 432 (Ch. Div.), *aff'd. o.b.* 215 *N.J. Super.* 293, 294 (App. Div. 1986), *cert. denied* 484 *U.S.* 817, 98 *L. Ed.* 2d 34 (1987). It is hence not within the competence of the judiciary of one of the Compact states to rule that the Compact no longer exists by reason of abandonment. That is a matter for legislative action. It is, however, clear that the Delaware Bay provision of the regulation is entirely severable and that its illegality does not taint the validity of the remaining regulatory scheme.

Insofar as *N.J.A.C.* 7:25-22.1 to -22.4 affects menhaden fishing in the Delaware Bay, the regulation is invalid. In all other respects the regulation is valid and enforceable.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

THE DELAWARE WATERMEN'S ASSOCIATION, INC., a non-profit corporation of the State of Delaware; THE DELAWARE BAY WATERMEN'S ASSOCIATION, INC., a non-profit corporation of the State of New Jersey; GEORGE MOORE, CHESTER V. TOWNSEND, IV; WILLIAM R. LEAGER; RANDY GOONER; FRED W. WAGNER, III; CHARLES GIVENS; and MITCH AND PEARL FISHER t/a OCEAN FRESH SEAFOOD, Plaintiffs,	:CIVIL ACTION
v.	
EDWIN H. CLARK, II, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware; WILLIAM WAGNER, Director, Division of Fish and Wildlife; CHARLES LESSER, Assistant Director, Division of Fish and Wildlife; JUDITH YASKIN, Commissioner, Department of Environmental Protection, State of New Jersey; GEORGE HOWARD, Director of Division of Fish, Game and Wildlife; and BRUCE FREEMAN, Administrator, Marine Fisheries Administration, Defendants.	:NO. 92-318-SLR

June 19, 1992

BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

MEMORANDUM OPINION

SUE L. ROBINSON, DISTRICT JUDGE

Before the Court is a motion for temporary restraining order filed by plaintiffs the Delaware Bay Watermen's Association, Inc. ("DBWA"), a nonprofit corporation of the State of New Jersey; commercial waterman George Moore, Chester V. Townsend, IV, William R. Leager, Randy Gooner, Fred W. Wagner, Jr., and Charles Givens; and Mitch and Pearl Fisher, t/a Ocean Fresh Seafood. (Docket item, ("D.I.", 1). Plaintiffs seek relief against defendants Edwin Clark, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware ("DNREC") and William Wagner and Charles Lesser, Director and Assistant Director, respectively, of the DNREC Division of Fish and Wildlife, "for the specific and limited purpose of the enforcement of Finfish Regulation Nos. 10, 16 and 17 of the State of Delaware and all 1992 Amendments thereto." (D.I. 1) For the reasons that follow, plaintiffs' motion is denied.

FINDINGS OF FACT

After hearing conducted on June 15, 1992, the relevant facts of record are as follows:

1. In 1984, the State of Delaware enacted legislation captioned "Finfishing in Tidal Waters". Delaware Code Title 7, Chapter 9, as well as various regulations promulgated thereunder.

2. On January 15, 1992, after notice and public hearing, defendant DNREC promulgated amendments to Tidal Finfish Regulation No. 10. (D.I. 1, Ex. A)

Regulation No. 10(d) imposes a total ban on gill nets in the Delaware Bay and Atlantic Ocean from 12:01 a.m. on June 4, 1992 through midnight on June 30, 1992; Regulation No. 10(e) requires weakfish[1] to be caught only with a hook and line during the same period.[2] Regulation Nos. 10(a) and (d) respectively restrict non-commercial fishermen from possessing any weakfish which measures less than thirteen (13) inches, total length, and from possessing more than ten (10) weakfish, unless any such fish were purchased. Regulation No. 10(f) provides as follows:

> If the Secretary of the Department of Natural Resources and Environmental Control determines that the State of New Jersey has failed to implement on or before April 16, 1992, a complimentary control strategy to achieve a 25% reduction in the commercial exploitation of weakfish in 1992 as approved by the Weakfish Scientific & Statistical Committee and the Weakfish Board of the Atlantic States Marine Fisheries Commission, then the date "June 4," in

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1. Weakfish are a migratory species of finfish found along the Atlantic Coast of the United States and found in the greatest numbers between the coastal waters off Long Island, New York, to the coastal waters off North Carolina. Weakfish make a spring run up the coast and into the Delaware Bay estuary normally during the months of May and June. Weather and temperature of the water are factors of when the weakfish appear in the Bay; this year, the run commenced in June, rather than May, due at least in part to the unseasonably cool weather. (D.I. 1)

2. Also promulgated were amendments to Tidal Finfish Regulations Nos. 16 and 17. Regulation No. 16(a) limits gill net mesh sizes which may be used by commercial fisherman during the periods April 1 through June 30. Regulation No. 17 provides for a seasonal closure for gill nets in the Atlantic Ocean in the month of October, if the States of New Jersey and Maryland enact similar laws. Since the gill net size restrictions of Regulation No. 16 are irrelevant during the closure period of June 4 through June 30 and since Regulation No. 17 has not yet taken effect and, indeed, may never do so, Regulation No. 10 (the total year for operative provision at issue in the proceedings at bar.

paragraph (d) and (e) of Tidal Finfish Regulation No. 10 is null and void and in its place the date "June 13" shall be substituted.

3. Prior to enactment of Regulation No. 10, the Advisory Council on Tidal Finfisheries reviewed the 200 reduction in harvest called for in the draft amendments to Delaware's weakfish plan. According to the minutes of the August 20, 1991 meeting, a representative of plaintiff DBWA was present and indicated that the last three weeks of June would be a better closure period than the last two weeks of May, that May 15 through 30 was not acceptable to the DBWA. The Council agreed to recommend the June closure dates. (D.I. 9) On November 25, 1991, defendant DNREC held a public hearing regarding, *inter alia*, Regulation No. 10; plaintiffs participated in this hearing. (D.I. 8 at 4)

4. Regulation No. 10 was signed by defendant Secretary Clark on January 15, 1992 and became effective on February 16, 1992. Plaintiffs received copies of Regulation No. 10 on or before February 18, 1992. All commercial fishermen known to DNREC received a summary of recently enacted regulations, including Regulation No. 10, by letter dated April 1, 1992. (D.I. 8 at 5-6)

5. Plaintiff filed an appeal of Regulation No. 10 to the State's Environmental Appeals Board ("EAB") on April 15, 1992; on May 5, 1992, the EAB scheduled a hearing on the merits of plaintiffs' appeal for June 30, 1992. By agreement of counsel on June 1, 1992, the June 30, 1992 data was designated for resolution of defendants' motion to dismiss, a hearing on the merits has not been rescheduled. (D.I. 1, ¶24; D.I. 8 at 6)

6. At the April 21, 1992 meeting of the Advisory Council on Tidal Finfisheries, defendant Wagner informed the members present that "if any Delaware fisherman can demonstrate where gill netting can occur during [the] June closure . . . without a conflict with

weakfish", defendant Wagner would issue a permit to allow gill netting in that area. (D.I. 13, Ex. B)

7. The gill not prohibition of Regulation No. 10(d) went into effect at 12:01 a.m. on June 4, 1992; plaintiffs filed their motion for temporary restraining order at 2:29 p.m. on June 4, 1992.

8. As indicated by the language of Regulation No. 19(f), said Regulation was enacted to comply with (and does in fact comply with) the Atlantic States Marine Fishery Management Plan (the "Plan", D.I. 1, Ex. F), which Plan calls for a 25% reduction in the amount of weakfish caught in 1992. New Jersey passed similar legislation, also judged to be in compliance with the Plan, which allows gill netting designed for species other than weakfish, and which also provides a total ban on the commercial sale of weakfish from June 7, 1992 through June 30, 1992. (D.I. 1, Ex. B; D.I. 7; D.I. 8 at 5). Both the Delaware and New Jersey legislation, on their face, proclaim as their purposes the conservation of weakfish. In the "Summary of Hearing Officer Recommendations and Agency Response", offered into the record by plaintiffs in connection with New Jersey's legislative efforts, the following comment and response are relevant to this discussion:

> 2. COMMENT: The Atlantic States Marine Fisheries Commission (ASMFC) asked for a 10 to 25 percent reduction in catch. Why is this State (New Jersey) going for the maximum reduction of 25 percent when some states are apparently reducing their catches by 15 percent?
>
> RESPONSE: The ASMFC recommended a 25 percent reduction in annual exploitation be maintained for the next three years and directed that each state with directed weakfish fisheries (Massachusetts to North Carolina) implement a control strategy to achieve up to 25 percent in 1992. These same states are to ensure that a control strategy is in effect to achieve a reduction in annual exploitation by 25

> percent in 1993 and continue this reduction and exploitation through at least 1994.
>
> Delaware and New Jersey are working cooperatively to implement management measures for the Delaware Bay. Each is committed to a 25 percent reduction provided the other complies. A change now would result in the collapse of the bi-state agreement. Compatible regulations in New Jersey and Delaware were a major concern of the Delaware Bay Bi-State Weakfish Action Commission.
>
> Most of the states have submitted proposals to the ASMFC to reduce mortality by at least 25 percent. North Carolina, which may be implementing lesser reductions in catch, will however, be required to reduce bycatch mortality in its shrimp trawl fisheries. Measures such as this will result in a significant reduction in the exploitation of juvenile weakfish. The only other state that may implement reductions of less than 25 percent would be Virginia.
>
> In light of the agreement with Delaware, the present condition of the stock and the compliance of most states with the ASMFC recommendation, the Department feels that responsible management calls for the higher reduction rate to be implemented immediately.

(D.I. 1, Ex. B)

9. Plaintiffs aver generally that "the prime income" for commercial fish is gained during the spring run occurring in the month[s] of May and June every year."[3] (D.I. 1, ¶26)

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3. Plaintiffs Chester V. Townsend, IV, Randy Gooner, Fred W. Wagner, Jr., and Charles Gibbons aver that they have been unable to obtain various fishing licenses (food fishing equipment permit or gill net license, seller's license, license for a commercial fishing operation) in Delaware. (D.I. 1, Exs. I, K, L, M) Their inability to obtain said licenses is linked, if at all, to the 1984 legislation, however, not to the enactment of Regulation No. 10.

10. More specifically, plaintiff George Moore avers that "the income from the month of June has accounted for most of [his] annual income", that he is "able to bring approximately $3,000.00 per month during the prime fishing season", that if he is "stopped from fishing during the prime season in the month of June", he will not be able to meet his monthly mortgage of $315.00. (D.I. 1, Ex. H)

11. Similarly, plaintiff William R. Leager avers that "the income from the month of June has accounted for approximately twenty to thirty percent (20 to 30%) of [his] annual income." (D.I. 1, Ex. J)

12. Plaintiff Chester V. Townsend, IV avers that "[a] June closing of the fishing on Delaware Bay pursuant to Amendments to the Finfish Regulation No. 10 will put [him] in very severe and dire financial straits", that he has "always depended upon the catch during the Spring run of fish in the Delaware Bay", and that "[i]n calendar year 1990, [he] was able to earn approximately . . . Seven Thousand Dollars ($7,000.00) . . . during the month of June" working with defendant Wagner. (D.I. 1, Ex. I)

13. Plaintiff Mitch Fisher, proprietor of Ocean Fish Seafood, avers that "[t]he prime season for obtaining fish from the Delaware Bay is during the Spring run, in the calendar year centered around the month of June when weakfish run into the Delaware Bay estuary", that "[i]t is during this period of time that most of the business of Ocean Fresh Seafood is transacted and where most of the income of said business is earned", and that "[t]he promulgation of [Regulation No. 10] would so severely restrict the supply of seafood to Ocean Fresh Seafood that it would practically put [plaintiff] out of business." (D.I. 1, Ex. N)

14. Plaintiff George Moore further avers that he obtained a special gill net permit; however, the area designated for fishing is not suitable to plaintiff's fishing operation by virtue of the size of his boat (only 21 feet in length) and the water and weather conditions of the

permitted fishing areas. (Supplemental affidavit of George Moore dated June 9, 1992)

15. According to the testimony of Richard Seagraves, who was instrumental in preparing the Weakfish Fishery Management Plan Amendment No. 1 for the Atlantic States Marine Fisheries Commission,[4] the Plan's provisions seek to maintain a minimum level of spawning stock biomass to ensure long-term stock replacement, as well as maintaining the "traditional" balance between commercial and recreational fishermen. Because weakfish do not survive netting, simple limits on gill net mesh sizes was deemed inadequate to effect the 25% reduction in mortality. Closure, however, was deemed an ineffective conservation measure for recreational fishermen. Mr. Seagraves concluded that Delaware's plan for a 25% reduction in the exploitation of weakfish in 1992, although judged in compliance with the Plan, will have no long-term effect absent uniformity on the part of all of the Atlantic States.

CONCLUSIONS OF LAW

The standard for obtaining a temporary restraining order is the same as the standard for a preliminary injunction. Fed.R.Civ.P. 65(b); *Tootsie Roll Industries, Inc. v. Satters, Inc.*, 666 F. Supp. 655, 658 (D. Del. 1987). It is beyond dispute that "the grant of injunctive relief is an 'extraordinary remedy, which should be granted only in limited circumstances.' " *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989), *citing Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988). Thus, in ruling on a motion for a preliminary injunction, this Court must consider:

> (1) the likelihood that the [movant] will prevail on the merits at final hearing; (2) the extent to which the [movant] is being irreparably harmed by the conduct complained of; (3) the extent to which the

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4. Mr. Seagraves was formally associated with defendant DNREC.

> [nonmoving party] will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest.

Opticians Ass'n v. Independent Opticians, 920 F.2d 187, 191-92 (3d Cir. 1990). As recently reaffirmed by the Third Circuit, an

> injunction should issue only if the [movant] produces evidence sufficient to convince the . . . [C]ourt that all four factors favor preliminary relief.

Merchant & Evans, Inc. v. Roosevelt Building Products, Inc., No. 91-1773, 1992 U.S. App. LEXIS 10399 (3d Cir. 1992) at 7. *See also Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d at 800, *quoting In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982).

Reasonable Probability of Success on the Merits

In support of their position that Regulation No. 10 should be deemed invalid and unenforceable, plaintiffs proffer several arguments, to wit: 1) the enforcement of Regulation No. 10 violates an interstate compact contemplated in 1905 by the States of Delaware and New Jersey; 2) Regulation No. 10 is discriminatory and violates the Commerce Clause of the U.S. Constitution; 3) Regulation No. 10 violates the Privileges and immunities Clauses of the U.S. Constitution; 4) Regulation No. 10 violates the Supremacy Clause of the U.S. Constitution; and 5) Regulation No. 10 violates the Due Process and Equal Protection Clauses of the U.S. Constitution. Each of these arguments will be addressed *seriatim*.

Interstate Compact

In 1905, the States of Delaware and New Jersey ratified and confirmed a compact or agreement between them respecting the Delaware River and Bay (the "Compact"). Said Compact is codified, respectively, at 23 Del. Laws, Chapter 5, and *N.J.S.A.* 52:28-34 246, and

was ratified by the U.S. Congress in 1907. 34 *Stat.* 858 (1907). As explained by the New Jersey Supreme Court in its recent decision, *Ampro Fisheries, Inc. v. Yaskin*, A-62/63, 1992 N.J. LEXIS 374 (N.J. Supr. June 4, 1992) at 16-17,

> [t]he purpose of the Compact was to resolve a long-standing boundary dispute between the States regarding a twelve-mile arc around the Town of New Castle on the Delaware River. The Compact was also designed to resolve a twenty-seven-year-old lawsuit that was pending before the United States Supreme Court involving Delaware fishing regulation. . . . The dispute began in 1872 with Delaware authorities arresting twenty-two New Jersey fishermen on the Delaware River for fishing without a Delaware license. The fees demanded of New Jersey fishermen were greater than those charged to citizens of Delaware. . . .

The Compact specifically provides, in Article III, that "[t]he inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said River between low-water marks on each side of said River between the said States . . . ." (D.I. 1, Ex. P) Article IV provides in relevant part as follows:

> Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three Commissioners to confer with three Commissioners to be immediately appointed by the General Assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said Commissioners for each State respectively *shall, within two years from the date of their appointment, report to the Legislature of each of said States the proposed laws*

> *so framed and recommended by said joint Commission. Upon the adoption and passage of said laws so recommended by the respective Legislatures of said two States said law shall constitute the sole laws for the regulation of the taking and catching of fish in the said River and Bay between said States.*

(D.I. 1, Ex. P) (emphasis added). Article V of the Compact provides that "[a]ll laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery here and above mentioned, shall continue in force in said respective States until the enactment of said concurrent legislations as herein provided." Article IX of the Compact provides in relevant part that "[u]pon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued, without cost to either party, and without prejudice. Pending the ratification hereof by Congress said suit shall remain in *statu quo*." (D.I. 1, Ex. P) It is undisputed, for purposes of this proceeding, that the proposed laws framed and recommended by the joint Commission were not adopted and enacted by the respective Legislatures of the States of Delaware and New Jersey; i.e., there have never been uniform laws enacted as between Delaware and New Jersey pursuant to the Compact. (D.I. 1, ¶¶21, 22, 23)

Plaintiffs argue generally that "the Compact must have some meaning. . . . The lack of enforcement of the Compact over time does not render it inoperative." (D.I. 11 at 9-10) Plaintiffs conclude: "[B]ecause regulation of the fishery in Delaware Bay can only be accomplished by joint regulations by New Jersey and Delaware . . . and because there is no such joint regulation relating to . . . this fishery, Delaware's regulation of this fishery in the

Delaware Bay contravenes state and federal law and must be held invalid." (D.I. 1, ¶23)

Other courts which have reviewed the Compact and its viability have rejected similar arguments. In 1983, the Court of Chancery of the State of Delaware was asked by plaintiffs, described as commercial fishermen and a corporate association representing the interests of commercial fishermen, to enjoin defendant DNREC from enforcing certain regulatory statutes which restricted the use of staked or anchored gill nets in the Delaware Bay. *Delaware Watermen's Association v. State of Delaware*, C.A. No. 789 (Del. Ch. March 31, 1983),[5] slip op. at 2. The dispute was characterized by the court as "yet another manifestation of an ongoing dispute between commercial and recreational fishing interests". *Id.* The court noted that because the statutory prohibition against the use of staked nets had not been enforced for at least the last twenty years, defendant DNREC had given the public notice that enforcement measures would be taken commencing six months in the future.[6] *Id.* at 5. Plaintiffs argue, *inter alia*, that the statutes should be held invalid because they were enacted in violation of the 1905 Compact and should be deemed unenforceable by virtue of the legal principle of *desuetude*.

As to the 1905 Compact, the court, acknowledging that the Compact had not been adhered to by either States since its enactment, characterized plaintiffs' argument as follows:

> [T]o accept plaintiffs' argument would mean that following the approval of the Compact neither State could enact any law governing its portion of the

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5. This decision is available on LEXIS but has no LEXIS citation.

6. Enforcement was to commence April 1, 1983; plaintiffs argued that April and May were the months when fishing by staked gill nets were the most productive and when the made the major part of their living for the year.

> River and Bay unless it was agreed to by the other State and was in conformity with the laws of the other State on the subject. It would mean that unless both States agreed to the same laws, there would be no laws applicable to the Bay. It would mean that unless New Jersey agreed to do likewise, Delaware could not enact laws to regulate fishing in its own waters, and vice versa. This hardly seems logical. As such, the illogical consequences of the plaintiffs' argument on this point would not seem to indicate a likelihood of success on the merits at final hearing.

Id. at 11.

With respect to plaintiffs' *desuetude* argument, the court explained the underlying theory as being "that a penal statute can be abrogated by nonenforcement over a prolonged period of time. Briefly stated, the argument runs that where statutes are long unenforced, the community at large tends not to obey them and as a consequence they become, in fact, dead letter insofar as the law is concerned." *Id.* Although the court conceded the theoretical application of *desuetude* to the facts at bar, it concluded that since the regulations in question were not outdated or obsolete on their face and the enforcing officials gave notice that the period of nonenforcement was coming to an end, plaintiffs were not likely to prove that they were entitled to a permanent injunction against the enforcement of the regulations at issue based on this theory.

Most recently, the New Jersey Supreme Court reviewed the 1905 Compact in determining whether the Compact prohibits New Jersey from unilaterally regulating the fishing of Menhaden and the territorial waters of New Jersey and the Delaware Bay. *Ampro Fisheries, Inc. v. Yaskin*, A-62/63, 1992 N.J. LEXIS 374 (N.J. Supr. June 4, 1992). The court held that the Compact was not enforceable because a "condition-precedent" had never been satisfied. More specifically, Commissioners of both

States were required to recommend a joint regulation of a particular species of fish and the Legislatures of each State was required to adopt and pass any such joint regulation. Although the joint Commission apparently did propose joint regulations, the States did not jointly enact such legislation. According to the New Jersey Supreme Court, therefore, "[a]bsent such a concurrence, each State presumably would retain the right, at least within its territorial waters, to regulate the taking and catching of fish in the River . . . *See Nicoulin v. O'Brien*, 248 U.S. 113, . . . (1918) . . .; *State v. Mick*, No. 83-05-0092-93 (Del. Super. Ct. May 2, 1984) (1905 Compact did not require passage of uniform laws unless recommended by commissioners)." *Id.* at 19-20.

This Court joins with its sister courts in rejecting plaintiffs' argument. It is clear from the face of the Compact that in 1905, the States agreed to a mechanism for passing uniform laws, and further agreed that after passage of uniform laws in accordance with that mechanism, previously existing laws would be supplanted. It is equally clear, however, that the uniform scheme authorized by the 1905 Compact has never been implemented; "the respective Legislatures of said two States" have never enacted "the proposed laws so framed and recommended by said joint Commission". The fact that the two States have collaborated, or not, on legislation affecting the fisheries on the Delaware River and Bay, including the legislation at issue and the Plan, without any reference whatsoever to the Compact, demonstrates that the 1905 Compact carries no legal impact presently, that it represents nothing more than a past indication of good intentions. Plaintiffs have cited no contrary authority. The Court, therefore, finds that the plaintiffs have not carried their burden of demonstrating a likelihood of their prevailing on this issue at a final hearing.

Commerce Clause

The Commerce Clause of the U.S. Constitution, Article I, Section 8, Clause 3, grants to Congress the power to regulate commerce among the several States.

The standard used to determine whether a state has violated the Commerce Clause can be phrased as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *See also Maine v. Taylor*, 477 U.S. 131, 138 (1986). Given the traditional role accorded states as stewards of the fisheries within their territorial waters, *see, e.g.*, *Manchester v. Massachusetts*, 139 U.S. 240 (1891), plaintiffs must demonstrate that the effect of Regulation No. 10 on interstate commerce is clearly excessive to the purpose of such regulation, i.e., the conservation of weakfish. *Cf. Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 287 (1977).

Plaintiffs argue in this regard that a great burden has been placed on interstate commerce, as evidenced by the affidavits of George Moore and Mitch Fisher, and that this burden has a discriminatory effect: 1) as between the States of Delaware and New Jersey; and 2) as between the recreational and commercial fishing industries. Contrary to plaintiffs' assertions, however, the record reflects that the States of Delaware and New Jersey have passed complementary legislation as between them, and that Regulation No. 10 imposes equivalent burdens on both the recreational and commercial fishing industries, all to effect the 25% reduction in the exploitation of weakfish. The alleged burden, therefore, is not discriminatory; nor have plaintiffs demonstrated with sufficient particularity that the alleged burden is excessive in relation to the Regulation's putative benefit. *Cf. Drabbant Enterprises, Inc. v. Great Atlantic &*

Pacific Tea Co., 688 F. Supp. 1567, 1573-74 (D. Del. 1988). Plaintiffs have cited no contrary authority on point.

Privileges and Immunities Clauses

Article IV, Section 2, Clause 1 of the U.S. Constitution provides that citizens of the each state should receive all the "privileges and immunities" of citizens of other states. Section 1 of the Fourteenth Amendment prohibits the states from making laws which would abridge "the privileges and immunities of citizens of the United States". Plaintiffs argue in this regard that the Privileges and immunities Clauses accord "as a matter of constitutional right that the citizens of the two States [of Delaware and New Jersey] be placed upon the same footing with each other so far as the advantages resulting from citizenship in those States are concerned." (D.I. 1, ¶38)

Regulation No. 10(d) provides that "[i]t shall be unlawful for *any person* to fish with any gill net in the Delaware Bay and Atlantic Ocean during a period beginning at 12:01 a.m. on June 4, 1992 and ending at midnight on June 30, 1992." (Emphasis added) The Regulation, therefore, is resident-neutral; citizens of the different States are placed on an equal footing. Regulation No. 10, therefore, does not offend the Privileges and Immunities Clauses. *See Glenovich v. Noerenberg*, 346 F. Supp. 1286, 1293-94 (D. Alaska), *aff'd*. 409 U.S. 1070 (1972). Plaintiffs have cited no contrary authority on point.

Supremacy Clause

The Supremacy Clause, Article VI, Section 2 of the U.S. Constitution, provides that "the Laws of the United States . . . Shall be the supreme Law of the Land. . . ." Plaintiffs apparently argue that the Compact, which was authorized by Congress, is a federal law which supplants the Regulation at issue.

By consenting to the Compact in 1907, however, Congress did no more than give its approval to the States' entering into such an interstate agreement. By its consent, Congress did not alter the mechanism provided for in the Compact for passing uniform state legislation or otherwise alter the Compact as proposed by the States in their respective statutes in any way. Because Congress has not expressed an intent, through the Compact or elsewhere, to displace state action in this area traditionally regulated by the States, *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), there is no evidence of record that the Supremacy Clause has been violated by the enactment/enforcement of Regulation No. 10. *See Ingersoll-Rand Company v. McClendon*, 111 S.Ct. 478, 482 (1990). Plaintiffs have cited no contrary authority on point.

Due Process/Equal Protection

Plaintiffs argue that Regulation No. 10 does "not apply equally to all persons under similar circumstances and conditions on the Bay." (D.I. 11 at 15) Plaintiffs more specifically argue that because New Jersey and Delaware fishermen are not subject to the same regulations, plaintiffs have demonstrated a violation of the Fourteenth Amendment.

Plaintiffs miss the point. As they concede, a New Jersey fisherman using his gill net in Delaware's territorial waters would be "subject to all the penalties" of Regulation No. 10, as would a Delaware fisherman. There is equal treatment among residents of the different States.

As between recreational and commercial fishermen, the latter is not a suspect class that would subject Regulation No. 10's purported disparate treatment to strict scrutiny. *See Sisk v. Texas & Wildlife Dept.*, 644 F.2d 1056, 1058 (5th Cir. 1981). Restrictions on the fishing activities of a state's citizens are valid if reasonable under the Fourteenth Amendment. *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314

F.2d 169, 174 (9th Cir.), *cert denied* 375 U.S. 829 (1963). Plaintiffs have cited not one case to the contrary. According to plaintiffs' own expert, Richard Seagraves, the recreational and commercial fishing industries were burdened in an equivalent fashion to best effectuate the desired conservation measures.

Irreparable Harm

The Third Circuit has analyzed this prong of the preliminary injunction standard as follows:

> Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a "clear showing of immediate irreparable injury.". . . The "requisite feared injury or harm must be irreparable – not merely serious or substantial," and it "must be of a peculiar nature, so that compensation of money cannot atone for it."

ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) (citations omitted). This Court has required "particularized proof of the direct harm caused by the defendant" to demonstrate that threatened economic injury is "sufficiently peculiar" to justify injunctive relief. *Drabbant Enterprises, Inc. v. Great Atlantic & Pacific Tea Co.*, 688 F. Supp. at 1573.

Plaintiffs assert that they have established a risk of immediate irreparable harm by demonstrating the grave economic consequences of the closure period and their inability to recover for such economic damages from the State. There is no dispute that Regulation No. 10 impacts negatively on plaintiffs' ability to earn their livelihood as commercial fishermen.

Relief of Hardship

However, in weighing the possibility of harm to other interested parties from the granting of the injunction and the public interest, several factors support the Court's conclusion that the form and magnitude or the relief requested cannot be justified under the Third

Circuit's preliminary injunction standards. Despite plaintiffs' assertions that Regulation No. 10 has no environmental purpose but was enacted solely to put commercial fishermen out of business, the record is replete with evidence to the contrary. An injunction in this matter would not only impair the State of Delaware's ability to regulate and manage its important natural resources, but would impair as well the ability of its sister states to do so. The public interest in conserving the weakfish fisheries is compelling; plaintiffs' request to overturn the *status quo*[7] is not. Under these circumstances, the balance of hardship weighs against plaintiffs' position.

CONCLUSION

For the reasons stated and on the record before me, I decline to grant the extraordinary relief requested by plaintiffs at bar.

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7. By filing their request for relief after the effective date of Regulation No. 10, plaintiffs seek relief which would overturn, not maintain, the *status quo*.

United States Constitution, Article I, Section 8, Clause 3

Sec. 8, Cl. 3. Power of Congress to regulate commerce.

The Congress shall have power . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; . . .

United States Constitution, Article VI, Section 2

Article VI. Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution Laws of any State to the Contrary notwithstanding.

28 U.S.C. 1257(a)

§ 1257. State Courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right , privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch 646, § 1, 62 Stat. 929; July 29, 1970,

P. L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)

International Rules of the Road
Rule 3(d), 33 U.S.C. foll. §1602

Rule 3. General definitions

For the purpose of these Rules, except where the context otherwise requires:

(a) The word "vessel" includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water.

(b) The term "power-driven vessel" means any vessel propelled by machinery.

(c) The term "sailing vessel" means any vessel under sail provided that propelling machinery, if fitted, is not being used.

(d) The term "vessel engaged in fishing" means any vessel fishing with nets, lines, trawls or fishing apparatus which restrict manoeuvrability, but does not include a vessel fishing with trolling lines or other fishing apparatus which do not restrict manoeuvrability.

(e) The word "seaplane" includes any aircraft designed to manoeuvre on the water.

(f) The term "vessel not under command" means a vessel which through some exceptional circumstances is unable to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel.

(g) The term "vessel" restricted in her ability to manoeuvre" means a vessel which from the nature of her work is restricted in her ability to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel. The term "vessels restricted in their ability to manoeuvre" shall include but not be limited to:

(i) A vessel engaged in laying, servicing or picking up a navigation mark, submarine cable or pipeline;

(ii) A vessel engaged in dredging, surveying or underwater operations;

(iii) A vessel engaged in replenishment or transferring persons, provisions or cargo while underway;

(iv) A vessel engaged in the launching or recovery of aircraft;

(v) A vessel engaged in mineclearance operations;

(vi) A vessel engaged in a towing operation such as severely restricts the towing vessel and her tow in their ability to deviate from their course.

(h) The term "vessel constrained by her draught" means a power-driven vessel which, because of her draught in relation to the available depth and width of navigable water, is severely restricted in her ability to deviate from the course she is following.

(i) The word "underway" means that a vessel is not at anchor, or made fast to the shore, or aground.

(j) The words "length" and "breadth" of a vessel mean her length overall and greatest breadth.

(k) Vessels shall be deemed to be in sight of one another only when one can be observed visually from the other.

(l) The term "restricted visibility" means any condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, sandstorms or any other similar causes.

(As amended 54 F.R. 38852, Sept. 21, 1989.)

Inland Rules of the Road
33 U.S.C. § 2003(d)

§ 2003. Definitions (Rule 3)

For the purpose of these Rules [33 USCS §§ 2001 et seq.] and this Act, except where the context otherwise requires:

(a) The word "vessel" includes every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water;

(b) The term "power-driven vessel" means any vessel propelled by machinery;

(c) The term "sailing vessel" means any vessel under sail provided that propelling machinery, if fitted, is not being used;

(d) The term "vessel engaged in fishing" means any vessel fishing with nets, lines, trawls, or other fishing apparatus which restricts maneuverability, but does not include a vessel fishing with trolling lines or other fishing apparatus which do not restrict maneuverability;

(e) The word "seaplane" includes any aircraft designed to maneuver on the water;

(f) The term "vessel not under command" means a vessel which through some exceptional circumstance is unable to maneuver as required by these Rules [33 USCS §§ 2001 et seq.] and is therefore unable to keep out of the way of another vessel;

(g) The term "vessel restricted in her ability to maneuver" means a vessel which from the nature of her work is restricted in her ability to maneuver as required by these Rules [33 USCS §§ 2001 et seq.] and is therefore unable to keep out of the way of another vessel; vessels restricted in their ability to maneuver include, but are not limited to:

(i) a vessel engaged in laying, servicing, or picking up a navigation mark, submarine cable, or pipeline;

(ii) a vessel engaged in dredging, surveying, or underwater operations;

(iii) A vessel engaged in replenishment or transferring persons, provisions, or cargo while underway;

(iv) a vessel engaged in the launching or recovery of aircraft;

(v) a vessel engaged in mineclearance operations; and

(vi) a vessel engaged in a towing operation such as severely restricts the towing vessel and her tow in their ability to deviate from their course.

(h) The word "underway" means that a vessel is not at anchor, or made fast to the shore, or aground;

(i) The words "length" and "breadth" of a vessel mean her length overall and greatest breadth;

(j) Vessels shall be deemed to be in sight of one another only when one can be observed visually from the other;

(k) The term "restricted visibility" means any condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, sandstorms, or any other similar causes;

(l) "Western Rivers" means the Mississippi River, its tributaries, South Pass, and Southwest Pass, to the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States, and the Port Allen-Morgan City Alternate Route, and that part of the Atchafalaya River above its junction with the Port Allen-Morgan City Alternate Route including the Old River and the Red River;

(m) "Great Lakes" means the Great Lakes and their connecting and tributary waters including the Calumet River as far as the Thomas J. O'Brien Lock and Controlling Works (between mile 326 and 327), the Chicago River as far as the east side of the Ashland Avenue

Bridge (between mile 321 and 322), and the Saint Lawrence River as far east as the lower exit of Saint Lambert Lock;

(n) "Secretary" means the Secretary of the department in which the Coast Guard is operating;

(o) "Inland Waters" means the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary;

(p) "Inland Rules" or "Rules" mean the Inland Navigational Rules [33 USCS §§ 2001 et seq.] and the annexes thereto, which govern the conduct of vessels and specify the lights, shapes, and sound signals that apply on inland waters; and

(q) "International Regulations" means the International Regulations for Preventing Collisions at Sea, 1972, including annexes currently in force for the United States.

(As amended Sept. 28, 1988, P. L. 100-448, § 14(1), 102 Stat. 1844.)

International Rules of the Road
Rule 18, 33 U.S.C. foll. § 1602

Rule 18. Responsibilities between vessels

Except where Rules 9, 10 and 13 otherwise require:

(a) A power-driven vessel underway shall keep out of the way of:

(i) A vessel not under command;

(ii) A vessel restricted in her ability to manoeuvre;

(iii) A vessel engaged in fishing;

(iv) A sailing vessel.

(b) A sailing vessel underway shall keep out of the way of:

(i) A vessel not under command;

(ii) A vessel restricted in her ability to manoeuvre;

(iii) A vessel engaged in fishing.

(c) A vessel engaged in fishing when underway shall, so far as possible, keep out of the way of:

(i) A vessel not under command;

(ii) A vessel restricted in her ability to manoeuvre.

(d)(i) Any vessel other than a vessel not under command or a vessel restricted in her ability to manoeuvre shall, if the circumstances of the case admit, avoid impeding the safe passage of a vessel constrained by her draught, exhibiting the signals in Rule 28.

(ii) A vessel constrained by her draught shall navigate with particular caution having full regard to her special condition.

(e) A seaplane on the water shall, in general, keep well clear of all vessels and avoid impeding their navigation. In circumstances, however, where risk of collision exists, she shall comply with the Rules of this Part.

Inland Rules of the Road
33 U.S.C. § 2018

§ 2018. Responsibilities between vessels (Rule 18)

Except where Rules 9, 10, and 13 [33 USCS §§ 2009, 2010, and 2013] otherwise require:

(a) **Power-driven vessels underway.** A power-driven vessel underway shall keep out of the way of:

(i) A vessel not under command;

(ii) A vessel restricted in her ability to manoeuvre;

(iii) A vessel engaged in fishing; and

(iv) A sailing vessel.

(b) Sailing vessels underway. A sailing vessel underway shall keep out of the way of:

(i) A vessel not under command;

(ii) A vessel restricted in her ability to manoeuvre; and

(iii) A vessel engaged in fishing.

(c) Vessels engaged in fishing when underway. A vessel engaged in fishing when underway shall, so far as possible, keep out of the way of:

(i) A vessel not under command; and

(ii) A vessel restricted in her ability to manoeuvre.

(d) Seaplanes on the water. A seaplane on the water shall, in general, keep well clear of all vessels and avoid impeding their navigation. In circumstances, however, where risk of collision exists, she shall comply with the Rules of this Part. [33 USCS §§ 2004 et seq.]
(Dec. 24, 1980, P. L. 96-591, § 2 in part, 94 Stat. 3422.)

46 U.S.C. § 12101

§ 12101. Related terms in other laws

(a) In this chapter [46 USCS §§ 12101 et seq.]-

(1) "fisheries" includes processing, storing, transporting (except in foreign commerce), planting, cultivating, catching, taking, or harvesting fish, shellfish, marine animals, pearls, shells, or marine vegetation in the navigable waters of the United States or in the exclusive economic zone.

(2) "rebuilt" has the same meaning as in the second proviso of section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. 883).

(b) When used in a law, regulation, document, ruling, or other official act referring to the documentation of a vessel-

(1) "certificate of registry", "register", and "registry" mean a registry endorsement as provided in section 12105 of this title [46 USCS § 12105].

(2) "license", "enrollment and license", "license for coastwise (or coasting) trade", and "enrollment and license for the coastwise (or coasting) trade" mean a coastwise endorsement as provided in section 12106 of this title [46 USCS § 12106].

(3) "enrollment and license to engage in the foreign and coastwise (or coasting) trade on the northern, northeastern, and northwestern frontiers, otherwise than by sea" means a Great Lakes endorsement as provided in section 12107 of this title [46 USCS § 12107].

(4) "yacht" means a recreational vessel even if not documented.

(5) "license for the fisheries" and "enrollment and license for the fisheries" mean a fishery license as provided in section 12108 of this title [46 USCS § 12108].

(Aug. 26, 1983, P. L. 98-89, § 1, 97 Stat. 585; July 17, 1984, P. L. 98-364, Title IV, § 402(16), 98 Stat. 450; May 15, 1985, P. L. 99-36, § 1(a)(7)(B) in part, 99 Stat. 67.)

46 U.S.C. § 12104

§ 12104. Effect of documentation

A certificate of documentation is-

(1) conclusive evidence of nationality for international purposes, but not in a proceeding conducted under the laws of the United States;

(2) except for a recreational endorsement, conclusive evidence of qualification to be employed in a specified trade; and

(3) not conclusive evidence of ownership in a proceeding in which ownership is in issue.

(As amended Dec. 12, 1989, P. L. 101-225, Title III, § 301(a)(4), 103 Stat. 1920.)

46 U.S.C. § 12108

§ 12108. Fishery licenses and registry

(a) A certificate of documentation may be endorsed with a fishery endorsement for a vessel that-

(1) is eligible for documentation;

(2) (A) was built in the United States; or

(B) if not built in the United States, was captured in war by citizens of the United States and lawfully condemned as prize, was adjudged to be forfeited for a breach of the laws of the United States, or qualified for documentation under section 4136 of the Revised Statutes (46 App. U.S.C. 14);

(3) if rebuilt, was rebuilt in the United States; and

(4) otherwise qualifies under the laws of the United States to be employed in the fisheries.

(b) Subject to the laws of the United States regulating the fisheries, only a vessel for which a certificate of documentation with a fishery endorsement is issued may be employed in the fisheries.

(c) A fishery endorsement to engage in fishing in the territorial sea and fishery conservation zone adjacent to Guam, American Samoa, and the Northern Mariana Islands may be issued to a vessel that-

(1) is less than two hundred gross tons;

(2) was not built or rebuilt in the United States;

(3) is eligible for documentation; and

(4) otherwise qualifies under the laws of the United States to be employed in the fisheries.

(As amended Jan. 11, 1988, P. L. 100-239, § 3(4), (5), 6(a)(6), 101 Stat. 1779, 1782; Dec. 12, 1989, P. L. 101-225, Title III, § 301(a)(8), 103 Stat. 1921.)

N.J.S.A. 52:28-34 to -46

Bi-State Compact

ARTICLE 3. NEW JERSEY AND DELAWARE

52:28-34. Preamble

Whereas, by joint resolution of the legislature of the state of New Jersey, approved February fourteenth, one thousand nine hundred and five, Edward C. Stokes, governor; Robert H. McCarter, attorney general; Franklin Murphy and Chauncey G. Parker were appointed and constituted commissioners of the state of New Jersey to confer with like commissioners representing the state of Delaware for the purpose of framing a compact or agreement between the said states and legislation consequent thereon, to be submitted to the legislatures of the said two states for action thereon looking to the amicable termination of the suit between said two states

now pending in the supreme court of the United States, and the final adjustment of all controversies relating to the boundary line between said states and to their respective rights in the Delaware river and bay; and

Whereas, by like joint resolution of the general assembly of the state of Delaware, approved February thirteenth, one thousand nine hundred and five, Preston Lea, governor; Robert H. Richards, attorney general; Herbert H. Ward and George H. Bates were appointed to represent the said state as commissioners to confer with the commissioners of the state of New Jersey for the purpose before recited; and

Whereas, the commissioners of the said two states, having duly conferred as directed by said resolutions, have framed and submitted to this legislature a proposed compact or agreement between the said states; and

Whereas, the compact or agreement so framed and submitted is in the words following, that is to say:

Compact between the state of New Jersey and the state of Delaware relating to the boundary controversy between said states.

Whereas, a controversy hath heretofore existed between the states of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware river as is included within the circle of twelve miles radius, an arc of which constitutes the northern boundary of the state of Delaware, and it is the mutual desire of said states to so settle and determine such controversy as to prevent future complications arising therefrom; and

Whereas, there is now pending in the supreme court of the United States a cause wherein the said state of New Jersey is the complainant and the said state of Delaware is the defendant, in which cause an injunction has been issued against the state of Delaware restraining the execution of certain statutes of the state of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upwards; and

Whereas, for the purpose of adjusting the differences between the said two states arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy and Chauncey G. Parker have been appointed commissioners on the part of the state of New Jersey by joint resolution of the legislature of said state, and Preston Lea, Robert H. Richards, Herbert H. Ward and George H. Bates have been appointed commissioners on the part of the state of Delaware, by joint resolution of the general assembly of said state, to frame a compact or agreement between the said states and legislation consequent thereon, to be submitted to the legislatures of said two states for action thereon, looking to the amicable termination of the said suit between said states now pending in the supreme court of the United States and the final adjustment of all controversies relating to the boundary line between said states, and to their respective rights in the Delaware river and bay;

Now, therefore, the said state of New Jersey by its commissioners above named and the said state of Delaware, by its commissioners above named, do hereby make and enter into a compact or agreement between said states as follows:

L.1905, c. 42, Preamble, p. 67 (C.S. p. 5374, Preamble).

52:28-35. Serving criminal process issued by New Jersey

Article I. Criminal process issued under the authority of the state of New Jersey against any person accused of an offense committed upon the soil of said state, or upon the eastern half of said Delaware river, or committed on board of any vessel being under the exclusive jurisdiction of that state, and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof, may be served upon any portion of the Delaware river between said states from low-water mark on the New Jersey

shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the state of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the state of Delaware.
L.1905, c. 42, Art. I, p. 69 (C.S. p. 5375, § 49).

52:28-36. Serving criminal process issued by Delaware

Article II. Criminal process issued under the authority of the state of Delaware against any person accused of an offense committed upon the soil of said state, or upon the western half of said Delaware river, or committed on board of any vessel being under the exclusive jurisdiction of that state, and also civil process issued under the authority of the state of Delaware against any person domiciled in that state, or against property taken out of that state to evade the laws thereof, may be served upon any portion of the Delaware river between said states from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the state of New Jersey.
L.1905, c. 42, Art. II, p. 70 (C.S. p. 5375, § 50).

52:28-37. Common fishing rights

Article III. The inhabitants of the said states of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said river between the low-water marks on each side of said river between the said states, except so far as

either state may have heretofore granted valid and subsisting private rights of fishery.
L.1905, c. 42, Art. III, p. 70 (C.S. p. 5376, § 51).

52:28-38. Joint commission to draft laws relative to fishing and ascertain dividing line

Article IV. Immediately upon the execution hereof the legislature of the state of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the state of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware river and bay between said two states, which said commissioners for each state respectively shall, within two years from the date of their appointment, report to the legislature of each of said states the proposed laws so framed and recommended by said joint commission. Upon the adoption and passage of said laws so recommended by the respective legislatures of said two states, said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said states. Said laws shall remain in force until altered, amended or repealed by concurrent legislation of the said two states. Said commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two states, where said dividing line extended shall intersect the same, shall, at the joint expense of said states, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

The faith of the said contracting states is hereby pledged to the enactment of said laws to recommended by said commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective legislatures thereof.

Each state shall have and exercise exclusive jurisdiction within said river to arrest, try and punish its own inhabitants for violations of the concurrent legislation relating to fishery herein provided for.
L.1905, c. 42, Art. IV, p. 70 (C.S. p. 5376, § 52).

52:28-39. Continuance of existing laws

Article V. All laws of said states relating to the regulation of fisheries in the Delaware river not inconsistent with the right of common fishery herein above mentioned shall continue in force in said respective states until the enactment of said concurrent legislation is herein provided.
L.1905, c. 42, Art. V, p. 71 (C.S. p. 5376, § 53).

52:28-40. Shellfish industry not affected

Article VI. Nothing herein contained shall affect the planting, catching or taking of oysters, clams or other shellfish, or interfere with the oyster industry as now or hereafter carried on under the laws of either state.
L.1905, c. 42, Art. VI, p. 71 (C.S. p. 5376, § 54).

52:28-41. Riparian jurisdiction

Article VII. Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states.
L.1905, c. 42, Art. VII, p. 71 (C.S. p. 5376, § 55).

52:28-42. Rights in Delaware river preserved

Article VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either state of, in or over the Delaware river, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.
L. 1905, c. 42, Art. VIII, p. 71 (C.S. p. 5377, § 56).

52:28-43. Execution of agreement and submission to congress; suit discontinued

Article IX. This agreement shall be executed by the said commissioners when authorized to do so by the legislature of the said states. It shall thereupon be submitted to congress for its consent and approval. Upon the ratification thereof by congress it shall be and become binding in perpetuity upon both of said states; and thereupon the suit now pending in the supreme court of the United States, in which the state of New Jersey is complainant and the state of Delaware is defendant, shall be discontinued, without costs to either party and without prejudice. Pending the ratification hereof by congress said suit shall remain in statu quo.

Done in two parts (one of which is retained by the commissioners of Delaware, to be delivered to the governor of the state, and the other one of which is retained by the commissioners of New Jersey, to be delivered to the governor of the state) this ..... day of ....., in the year of our Lord one thousand nine hundred and five.

L.1905, c. 42, Art. IV, p. 72 (C.S. p. 5377, § 57).

52:28-44. Compact ratified

The foregoing compact or agreement, and every clause, matter and thing therein contained, be and the same is hereby adopted, ratified and confirmed as and for the act and deed of the state of New Jersey, and the commissioners of the said state are hereby authorized and empowered on its behalf to execute the same in duplicate, and to deliver one copy thereof to the commissioners of the state of Delaware.

L.1905, c. 42, 1, p. 72 (C.S. p. 5377, § 58).

52:28-45. Governor to transmit copy to the president

It shall be the duty of the governor, at or before the next session of the legislature, to transmit, a duly certified copy of this act to the president of the United

States, with the request that it be communicated to congress for its action thereon.
L.1905, c. 42, 2, p. 72 (C.S. p. 5377, § 59).

52:28-46. Appointment of commissioners to enter into agreement respecting boundary and jurisdiction

L.1935, c. 160, p. 387, entitled "An act concerning boundary and jurisdiction in Delaware river between this state and the state of Delaware," approved April fifteenth, one thousand nine hundred and thirty-five, saved from repeal. [This act provides for the appointment of three commissioners for New Jersey with authority to enter into an agreement with similar commissioners from Delaware relating to boundary and jurisdiction of the two states in the Delaware river, which agreement is not to be binding until ratified by legislatures of the two states and consented to by congress. One thousand dollars is appropriate to defray the expenses of the commissioners.]

N.J.A.C. 7:25-22.1

7:25-22.1 Menhaden season

The season for taking Atlantic menhaden (Brevoortia tyrannus) from the marine waters of the State of New Jersey by purse seine for fish meal reduction shall begin on the third Monday in May and end on the third Friday in October. This provision shall not impose a limited season for the taking of menhaden for bait, chum or purposes other than for fish meal reduction.

N.J.A.C. 7:25-22.2

7:25-22.2 Purse seine fishing of Atlantic menhaden

(a) Persons licensed to fish for Atlantic menhaden with a purse seine or shirred net in the marine waters of New Jersey pursuant to N.J.S.A. 23.3-51 and N.J.S.A. 23:3-52 who are taking Atlantic menhaden for purposes

other than bait, as provided in N.J.A.C. 7:2522.3, shall be subject to the following:

1. Fishing, for the purpose of this section, shall be defined as having a purse seine in the marine waters of this State.

2. Fishing shall be restricted to the Atlantic Ocean, not closer than 1.2 nautical miles of any point along the shore, jetties or piers. It will be incumbent upon the captain of a purse seine vessel to determine the possibility of drifting inside the 1.2 nautical mile limit while fishing, before setting his or her net. Drifting into the 1.2 nautical mile restricted area along the shore, or around a jetty or pier, while fishing shall constitute a violation of this subchapter.

3. A person shall not fish on Saturdays, Sundays, and the days on which Memorial Day, Independence Day, Labor Day and Columbus Day are officially observed by the State of New Jersey.

4. All pump outlets, except normal engine cooling water, shall discharge below the vessel's water line.

5. All discharge from fish pumps must be treated with a United States Coast Guard approved anti-foaming agent.

6. No refuse, litter or garbage of any kind, or any quantity of dead fish shall be thrown overboard or released from the vessel or its net(s).

7. The licensee is responsible for cleaning up any fish, fish-parts refuse, litter, or garbage of any kind which is released during any fishing operation or as a result of a fishing operation and must initiate such cleanup no later than 24 hours after the release begins. Upon the licensee's failure to initiate such cleanup within 24 hour period, the Department may conduct the cleanup or arrange for the performance

of the cleanup. In addition to any other penalties and remedies provided by law, the licensee shall be liable for all costs associated with such cleanup, including any administrative costs incurred by the Department. Such cleanup shall include, but not be limited to, the marine and estuarine waters of the State and adjacent beaches, shorelines and marshes.

8. No markers or buoys designating channels, crab pots, lobster pots, fish pots, or traps shall be disturbed by the act of fishing.

9. Persons subject to this subchapter shall notify the Division of Fish, Game and Wildlife's Marine Enforcement Office located at Nacote Creek, Star Route, Absecon, New Jersey when they intend to fish in State waters, by calling 609-441-3474. The notification shall be made both prior to and upon the completion of any fishing in State waters, by the Captain or his or her agent.

10. the possession of any fish, as defined at N.J.S.A. 23:2B-3e, other than Atlantic menhaden on a purse seine vessel harvesting menhaden is prohibited.

i. The simultaneous possession of Atlantic menhaden and any other fish, as defined at N.J.S.A. 23:2B-3e, and a purse seine, aboard a vessel of any person holding an Atlantic menhaden bait permit or any vessel conducting menhaden fishing operations, shall constitute prima facie evidence of a violation of this subchapter.

N.J.A.C. 7:25-22.3

7:25-22.3 Taking of Atlantic menhaden for bait

(a) Persons licensed to fish for Atlantic menhaden (Brevoortia tyrannus) with a purse seine or shirred net in the marine waters of New Jersey Pursuant to N.J.S.A.

23:3-51 and N.J.S.A. 23:3-52, may apply between January 1 and March 1 for a permit for the purpose of taking Atlantic menhaden for bait purposes only.

All persons licensed to take Atlantic menhaden for bait purposes only shall keep, on forms furnished by the Division of Fish, Game and Wildlife's Bureau of Marine Fisheries, accurate records of the amount and location of Atlantic menhaden harvested. Forms are available from the Trenton Office of the Division of Fish, Game and Wildlife, Bureau of Marine Fisheries, 501 East State Street, Third Floor, Trenton, New Jersey 08625. These records shall be filed by the 10th day of each month with the Division of Fish, Game and Wildlife's Trenton office. If no Atlantic menhaden were harvested during the month, a report to that effect shall be provided to the Division of Fish, Game and Wildlife's Bureau of Marine Fisheries.

(b) Persons licensed to fish for Atlantic menhaden with a purse or shirred net in the marine waters of New Jersey, for the purpose of taking Atlantic menhaden for bait purposes only, shall be subject to the following:

1. Fishing, for the purpose of this section, shall be defined as having a purse seine in the marine waters of this State.

2. Fishing shall be restricted to the Atlantic Ocean, not closer than 0.6 nautical miles of any point along the shore, jetties or fishing piers and to that portion of the Delaware Bay south and east of a line from Fourteen Foot light to Deadman Shoal light (Bug light) and thence to Dennis Creek light. Fishing shall be restricted in Raritan Bay and Sandy Hook Bay, not closer than 0.3 nautical miles of any point along the shore, jetties or piers. It will be incumbent upon the captain of a purse seine vessel to determine the possibility of drifting inside the limit while fishing, before setting his or her net. Drifting into the restricted area along the shore, or

around a jetty or pier while fishing shall be considered a violation of this subchapter.

3. The maximum length overall of any vessel fishing under the provisions of this section shall be 90 feet.

4. Purse seine or shirred nets shall not exceed 150 fathoms in length.

5. A person shall not fish on Saturdays, Sundays, and the days on which New Year's Day, Martin Luther King's Birthday, Lincoln's Birthday, Washington's Birthday, Good Friday, Memorial Day, Independence Day, Labor Day, Columbus Day, Election Day, Veteran's Day, Thanksgiving Day, Christmas Day are officially observed by the State of New Jersey.

6. Fishing shall be conducted only during the hours between sunrise and sunset.

7. Removal of fish from the purse seine shall be by brailing or dip netting only.

8. The possession of any fish, as defined at N.J.S.A. 23:2B-3e, other than Atlantic menhaden on a purse seine vessel harvesting Atlantic menhaden for bait is prohibited.

i. The simultaneous possession of Atlantic menhaden and any other fish, as defined at N.J.S.A. 23:2B-3e, and a purse seine, aboard a vessel of any person holding an Atlantic menhaden bait permit or any vessel conducting menhaden fishing operations, shall constitute prima facie evidence of the violation of this subchapter.

9. No refuse, litter or garbage of any kind, or any quantity of dead fish shall be thrown overboard or released from the vessel or its net(s).

10. The licensee is responsible for cleaning up any fish, fish-part, refuse, litter, garbage of any kind which is released during any fishing operation or as a result of a fishing operation and must initiate such cleanup no later than 24 hours after the release begins. Upon the licensee's failure to initiate such cleanup within the 24 hour period, the Department may conduct or arrange for the performance of the cleanup. In addition to any other penalties and remedies provided by law, the licensee shall be liable for all costs associates with such cleanup, including any administrative costs incurred by the Department. Such cleanup shall include, but not be limited to, the marine and estuarine waters of the State and adjacent beaches, shorelines and marshes.

11. No stakes, markers, or buoys designating channels, crab pots, lobster pots, fish pots, or traps, or staked leased shellfish grounds, shall be disturbed by the act of fishing.

12. Any vessel engaged in fishing for Atlantic menhaden for bait under the provisions of this section shall display, on both sides of the vessel amidship, a yellow capital letter "B" not less than five feet in height on a black square background not less than six feet on a side. For any vessel where the gunnel height is less than eight feet above the waterline at amidship, the ratio of height of the letter "B" to height (or width) of the square black background of the display shall remain in the same proportion, that is, 5:6, but may be reduced in size. In all cases, however, each side of the black background shall be no less than three-quarters of the height of the gunnel at amidship from the waterline.

N.J.A.C. 7:25-22.4

7:25-22.4 Vessel boarding

The operator of, or any other person on board, a fishing vessel subject to this subchapter, shall immediatcomply with instructions and signals issued by any law enforcement officer and facilitate a safe boarding and inspection of the vessel, its gear, equipment, catch, and any area where fish may be stored, for the purpose of enforcement of this subchapter.

23 Del. Laws, Ch. 5, March 20, 1905

Bi-State Compact

CHAPTER 5.

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

AN ACT to Ratify and Confirm a Compact or Agreement between the States of New Jersey and Delaware respecting the Delaware River and Bay and to authorize the execution thereof.

Whereas By joint resolution of the Legislature of the State of New Jersey, approved February 14th, 1905, Edward C. Stokes, Governor, Robert H. McCarter, Attorney General, Franklin Murphy and Chauncey G. Parker, were appointed and constituted Commissioners of the State of New Jersey to confer with like Commissioners representing the State of Delaware for the purpose of framing a compact or agreement between the said States and legislation thereon, to be submitted to the legislatures of the said two States for action thereon, looking to the amicable termination of the suit between said two States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware River and Bay;

And Whereas By like joint resolution of the General Assembly of the State of Delaware approved February 13th 1905, Preston Lea, Governor, Robert H. Richards, Attorney General, Herbert H. Ward and George H. Bates were appointed to represent the said State as Commissioners to confer with the Commissioners of New Jersey, for the purpose before recited;

And Whereas The Commissioners of the said two States having duly conferred as directed by said resolutions, have framed and submitted to this General Assembly a proposed compact or agreement between the said States;

And Whereas The compact or agreement so framed and submitted is in the words following, that is to say:

"Compact between the State of New Jersey and the State of Delaware relating to the boundary controversy between said States.

Whereas A controversy hath heretofore existed between the States of New Jersey and Delaware, relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve miles radius an arc of which constitutes the Northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom;

And Whereas There is now pending in the Supreme Court of the United States, a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued against the State of Delaware restraining the execution of certain statutes of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upwards;

And Whereas For the purpose of adjusting the differences between the said two States arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker, have been appointed Commissioners on the part of the

State of New Jersey by joint resolution of the Legislature of said State and Preston Lea, Robert H. Richards, Herbert H. Ward and George H. Bates have been appointed Commissioners on the part of the State of Delaware by joint resolution of the General Assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of said two States for action thereon, looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay;

Now Therefore, The said State of New Jersey, by its Commissioners above named, and the said State of Delaware, by its Commissioners above named, do hereby make and enter into a compact or agreement between said States as follows:

Article I. Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the Eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch Islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

Article II. Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

Article III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said river between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

Article IV. Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three Commissioners to confer with three Commissioners to be immediately appointed by the General Assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said Commissioners for each State respectively shall, within two years from the date of their appointment, report to the Legislature of each of said States the proposed laws so framed and recommended by said joint Commission. Upon the adoption and passage of said laws so recommended by the respective Legislatures of said two States said laws shall constitute the sole laws

for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended or repealed by concurrent legislation of the said two States. Said Commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States, where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said diving line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said Commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective Legislatures thereof.

Each State shall have and exercise exclusive jurisdiction within said river to arrest, try and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.

Article V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned, shall continue in force in said respective States until the enactment of said concurrent legislations as herein provided.

Article VI. Nothing herein contained shall affect the planting, catching or taking of oysters, clams or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States.

Article VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

Article IX. This agreement shall be executed by the said Commissioners, when authorized to do so by the Legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued, without costs to either party, and without prejudice. Pending the ratification hereof by Congress said suit shall remain in statu quo.

Done in two parts (one of which is retained by the Commissioners of Delaware, to be delivered to the Governor of that State, and the other one of which is retained by the Commissioners of New Jersey, to be delivered to the Governor of that State) this day of

in the Year of Our Lord, One Thousand Nine Hundred and Five."

Therefore, be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Section 1. The foregoing compact or agreement, and every clause, matter and thing therein contained, be, and the same is, hereby adopted, ratified and confirmed as and for the act and deed of the State of Delaware, and the Commissioners of the said State are hereby authorized and empowered, on its behalf, to execute the same in duplicate, and to deliver one copy thereof to the Commissioners of the State of New Jersey.

Section 2. It shall be the duty of the Governor, at or before the next session of Congress of the United States, to transmit a duly certified copy of this Act to the

President of the United States, with the request that it be communicated to Congress for its action thereon.

Approved March 20, A.D. 1905.

FIFTY-NINTH CONGRESS, SESS. II, CH. 394
34 U.S. Stat. 858 (1907)

CHAP. 394.-An Act Giving the consent of Congress to an agreement of compact entered into between the State of New Jersey and the State of Delaware respecting the territorial limits and jurisdiction of said States.

Whereas commissioners duly appointed on the part of the State of New Jersey and commissioners duly appointed on the part of the State of Delaware, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States, have executed certain articles, which are contained in the words following, namely:

First. Whereas a controversy hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve-mile radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom; and

Whereas there is now pending in the Supreme Court of the United States a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued against the State of Delaware restraining the execution of certain statues of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upwards; and

Whereas for the purpose of adjusting the differences between the said two States arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker have been

appointed commissioners on the part of the State of New Jersey by joint resolution of the legislature of said State, and Preston Lea, Robert H. Richards, Herbert H. Ward and George H. Bates have been appointed commissioners on the part of the State of Delaware by joint resolution of the general assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the legislatures of said two States for action thereon, looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay; Now therefore;

The said State of New Jersey, by its commissioners above named, and the said State of Delaware, by its commissions above named, do hereby make and enter into a compact or agreement between said States as follows:

ARTICLE I. Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch Islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

ART. II. Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

ART. III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said river between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

ART. IV. Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three Commissioners to confer with three Commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said Commissioners for each State respectively, shall, within two years from the date of their appointment, report to the Legislature of each of said States the proposed laws so framed and recommended by said joint Commission. Upon the adoption and passage of said laws so recommended by the respective legislatures of said two States said laws shall constitute the sole laws

for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended, or repealed by concurrent legislation of the said two States. Said Commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States, where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said diving line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective legislatures thereof.

Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.

ART. V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned, shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided.

ART. VI. Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

ART. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States.

ART. VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

ART. IX. This agreement shall be executed by the said commissioners when authorized to do so by the legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued, without costs to either party, and without prejudice. Pending the ratification hereof by Congress said suit shall remain in statu quo.

Done in two parts (one of which is retained by the commissioners of Delaware, to be delivered to the governor of the State, and the other one of which is retained by the commissioners of New Jersey, to be delivered to the governor of that State) this twenty-first day of March, in the year of our Lord one thousand nine hundred and five."

EDWARD C. STOKES,
ROBERT H. McCARTER,
FRANKLIN MURPHY,
CHAUNCEY G. PARKER,
PRESTON LEA,
ROBERT H. RICHARDS,
HERBERT H. WARD,
GEO. H. BATES,

And whereas the said agreement has been confirmed by the legislatures of the said States of New Jersey and Delaware, respectively: Therefore

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement and to each and every part and article thereof: *Provided,* That nothing therein contained shall be construed to impair or in any manner affect any right or jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Approved, January 24, 1907.

Supreme Court, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

No. 92-391

In The

Supreme Court of the United States

October Term, 1992

AMPRO FISHERIES, INC.,

Petitioners,

v.

JUDITH YASKIN, COMMISSIONER OF ENVIRONMENTAL PROTECTION; GEORGE HOWARD, DIRECTOR, DIVISION OF FISH, GAME AND WILDLIFE; and BRUCE FREEMAN, ADMINISTRATOR, MARINE FISHERIES ADMINISTRATION,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Commerce Clause of the Constitution prohibit the passage of non-discriminatory state regulations which further legitimate safety interests, the conservation of the menhaden resource, and the breeding of those fish which feed on menhaden, by prohibiting the taking of menhaden for industrial purposes within the State's near-shore waters, when the State's regulations do not pose an undue burden on out-of-state interests and are similar to those enacted by other states?

2. Is the State of New Jersey barred from regulating the taking of fish within its territorial waters in the Delaware Bay and River by reason of a 1905 Compact between New Jersey and Delaware which provided a mechanism for uniform bi-state regulation within those waters when the states have never adopted uniform laws?

3. Is a state precluded from restricting specified large commercial vessels to the 1.8 miles of its three miles of territorial waters that are furthest from its shoreline, simply because those vessels hold federal licenses, when the State's restriction furthers legitimate local safety interests and legitimate conservation interests?

4. Is a state preempted from enacting regulations intended to further boating safety, to promote conservation and to assure the availability of the menhaden fish resource to all user groups, by prohibiting the taking of menhaden for industrial purposes by purse seine within the 1.2 miles of waters closest to the State's shoreline, merely because Congress has enacted general laws governing vessel traffic?

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No. 92-391

In The

Supreme Court of the United States

October Term, 1992

AMPRO FISHERIES, INC.,

Petitioners,

v.

JUDITH YASKIN, COMMISSIONER OF ENVIRONMENTAL PROTECTION; GEORGE HOWARD, DIRECTOR, DIVISION OF FISH, GAME AND WILDLIFE; and BRUCE FREEMAN, ADMINISTRATOR, MARINE FISHERIES ADMINISTRATION,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

The Respondents, Judith Yaskin, Commissioner of Environmental Protection, et al., respectfully request that this Court deny the Petition for Certiorari seeking to review the opinion of the New Jersey Supreme Court reported at 127 N.J. 602, 606 A.2d 1099 (1992).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

At issue in this case is the constitutionality of regulations of the State of New Jersey which further local safety interests as well as legitimate conservation and resource allocation interests by restricting large commercial menhaden fishing vessels and their large nets to the 1.8 miles of the State's three mile-wide territorial waters furthest from its shoreline. The petitioner, a Virginia commercial fishing company, alleged that the regulations violated the Commerce and Supremacy Clauses of the United States Constitution and were foreclosed by a 1905 interstate Compact between the States of New Jersey and Delaware which relates to the waters of the Delaware Bay and River. The New Jersey Supreme Court rejected the constitutional challenge because the regulations did not discriminate against interstate commerce, advanced the legitimate state interests of eliminating spatial conflicts between the large industrial menhaden vessels and inshore sport fishermen and enhancing the breeding grounds for game fish feeding on menhaden, and were comparable to the restrictions placed on large industrial menhaden vessels by the states of Maryland, Delaware, North Carolina, South Carolina, New Hampshire and New York.

In addition, the State Supreme Court also held that the regulations were not preempted by federal navigational laws and thus not violative of the Supremacy Clause because Congress had not expressed an intent to displace state action in the field. The State Supreme Court further concluded that the 1905 Compact between Delaware and New Jersey did not preclude unilateral regulation by New Jersey within the Delaware Bay and River, because the "condition precedent" to any claim of exclusive jurisdiction under the Compact, namely the passage of uniform laws by both States, had never occurred.

According to the New Jersey Supreme Court, the State's regulations clearly constitute "reasonable and even handed conservation measures, so essential to the preservation of our vital marine sources of food supply." Moreover, the regulations are part of a "complex regulation of fisheries resources" that is "within the primary jurisdiction of the councils established under state and federal law." (Pa 16 to Pa 18). Accordingly, the regulations are valid, and further review by this Court is unwarranted.

This case first arose in 1990, when petitioner Ampro Fisheries, Inc. (hereafter "Ampro"), a company that fishes for the menhaden fish for reduction purposes (using the fish for their oil content) by using purse seine nets, filed a lawsuit in the New Jersey courts seeking to invalidate N.J.A.C. 7:25-22.2(a)(2), a regulation of the State of New Jersey that had been adopted some seven months earlier, in July 1989. This regulation prohibits purse seine fishing for menhaden for purposes other than for bait within 1.2 miles of the New Jersey shoreline, as well as within the State's territorial waters of the Delaware, Raritan, and

Sandy Hook Bays. A second State regulation, N.J.A.C. 7:25-22.3, prohibits purse seine fishing for menhaden for bait within .6 miles of the New Jersey shoreline, within .3 miles of shore in Raritan and Sandy Hook Bays and within designated areas of Delaware Bay, and also prohibits the use of vessels exceeding 90 feet in length for such fishing and the use of nets exceeding 150 fathoms (900 feet).

N.J.A.C. 7:25-22.2 was adopted to eliminate conflicts between recreational fishermen and large menhaden boats and nets in New Jersey's crowded near-shore waters, to protect the juvenile menhaden found in those waters as well as the birds and fish which feed on them, and to make menhaden more readily available as lobster and crab bait. The regulation does not restrict the size of the vessels or nets allowed to be used for purse seining for menhaden for purposes other than for bait, even though such vessels generally measure from 70 to 200 feet in length and use very large purse seine nets that are 1,000 to 1,400 feet long and ½ mile wide (Pa 4). Historically, New Jersey has issued about 16 annual licenses for purse seining for menhaden for purposes other than for bait, and a much lesser number of licenses for purse seining for menhaden for bait.

As a participant in the menhaden reduction industry, Ampro does not compete in the marketplace with participants in the menhaden bait industry, but with the producers of soy beans and other commodities that are oil sources. Ampro and other members of its industry obtain menhaden by using spotter aircraft to locate menhaden schools and using two purse boats to lay out a purse

seine net around the school. Once the school is surrounded, the bottom of the net is closed, or "pursed," and a triangle is formed by a large menhaden vessel and the two purse boats. A large hose is then lowered into the net and is used to pump all the fish in the purse seine net onto the large menhaden vessel (Pa 4 to Pa 5). The primary fishing zone for menhaden is three miles along the coastline (Pa 15).

Before the 1.2 mile restriction on purse seining for menhaden for non-bait purposes was adopted in 1989, New Jersey had prohibited all purse seining for menhaden within .6 miles of its shoreline. This restriction was adopted as an emergency measure in 1984, in response to a serious conflict between 16 menhaden vessels not involved in the bait industry and a group of recreational boaters that occurred in 1983, in which the small recreational boats were seriously endangered by the larger menhaden boats (Pa 21). Currently, the states of North Carolina, South Carolina, New Hampshire and New York all restrict the state territorial waters within which purse seining for menhaden is allowed, while the coastal states immediately to the south of New Jersey, Maryland and Delaware, completely prohibit such purse seining within their territorial waters extending three miles off-shore (Pa 15; Pa 17).

The state Appellate Division issued its opinion in the matter in April 1991 after rejecting Ampro's request for emergent relief in May 1990. In its opinion, the court rejected Ampro's claims that the state's regulations violated the Commerce, Supremacy and Privileges and Immunities Clauses of the federal Constitution, holding on the basis of the administrative record that the state

regulations advanced legitimate state interests in a nondiscriminatory manner and affected interstate commerce only indirectly and incidentally. The Appellate Division concluded that the regulations rationally distinguished between the menhaden bait industry and the menhaden reduction industry, that federal navigational and licensing laws did not preempt the State's "reasonable and nondiscriminatory conservation and environmental protection scheme," and that the regulations were fully authorized by the state enabling statute, N.J.S.A. 23:2B-1 *et seq.* However, the Appellate Division also held that the regulations were not valid within Delaware Bay, based on the premise that a 1905 Compact between New Jersey and Delaware precluded New Jersey from unilaterally regulating fisheries within the bay (Pa 19 to Pa 24).

The New Jersey Supreme Court granted applications for review and, on June 4, 1992, held that the State's menhaden regulations were valid in their entirety, thereby reversing the Appellate Division's ruling respecting the 1905 interstate Compact and the validity of the regulations within Delaware Bay. In affirming the validity of the regulations, the State Supreme Court held first that the 1905 interstate Compact does not currently *require* joint regulation by New Jersey and Delaware within Delaware Bay, because the Compact provided that each State would retain its right to regulate the fisheries within its territorial waters in the Bay and River until such time as both states adopted uniform laws, and New Jersey and Delaware never adopted such laws. The Court also held that on the basis of the record the regulations did not violate the Commerce Clause of the federal Constitution since they were not discriminatory and furthered the

legitimate State purposes of lessening conflicts between fishermen and enhancing the availability of menhaden as food for game fish such as bluefish, striped bass, and weakfish.

The New Jersey Supreme Court further held that the State's regulations were not preempted under the Supremacy Clause of the Federal Constitution because Congress had not "expressed its intent to displace state action in this field," and that the regulatory action at issue was also fully authorized by state law (Pa 16). In its opinion, the court observed that "maintaining the balance between the rights of those who pursue the fish and the preservation of the fish has been primarily delegated [by Congress] to the Marine Fisheries Council," and further observed that "[t]he Atlantic States Marine Fisheries Council should be empowered to resolve any undue interference by one of the States with the common resource." (Pa 17 to Pa 18).

The federal district court for the District of Delaware agreed with the decision by the New Jersey Supreme Court and denied a request for emergent relief made by the Delaware Bay Watermen's Association, Inc. and by individual commercial fishermen on June 19, 1992. In that proceeding, the plaintiffs sought to enjoin enforcement of a Delaware regulation intended to promote the conservation of weakfish, by arguing, among other things, that the regulation violated the 1905 Compact between New Jersey and Delaware. However, the Delaware federal district court rejected plaintiff's claim that the regulation violated the Compact, and concurred with the New Jersey Supreme Court that the Compact does not now preclude separate regulation by Delaware and New Jersey within

Delaware Bay because the uniform regulatory scheme the Compact authorized was never implemented. Memorandum Opinion, *Delaware Watermen's Assoc. v. Clark*, No. 92-318-SLR (June 19, 1992) (Pa 25 to Pa 43).*

New Jersey's regulations at issue in this matter were promulgated pursuant to the State's Marine Fisheries Management and Commercial Fisheries Act, N.J.S.A. 23:2B-1 *et seq.* (hereafter "the State Act"), which had been enacted to aid reciprocal relationships between New Jersey and other States, New Jersey and the Federal Government, and New Jersey and the fisheries management councils established under the Federal Fisheries Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 to 1882 (hereafter "the Federal Act"). N.J.S.A. 23:2B-2(b)4. The State Act directs the Commissioner of Environmental Protection to prepare fisheries management plans for each major fishery in the State, which are to be coordinated with and take into consideration the appropriate federal, federal-state, regional management council and interstate programs. N.J.S.A. 23:2B-6. In addition, the State Act also directs the Commissioner to cooperate with other state agencies, the Federal Government and the regional fisheries management councils established under the Federal Act in managing those fisheries resources common to New Jersey and to other States. N.J.S.A. 23:2B-8.

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* In 1984, the Delaware Superior Court also held that the Compact does not now preclude unilateral regulation by either New Jersey or Delaware. *State v. Mick*, No. 83-05-0092-93 (May 2, 1984).

Under the Federal Act, New Jersey is part of the Mid-Atlantic Fishery Management Council, along with the States of New York, Delaware, Pennsylvania, Maryland and Virginia. 16 U.S.C. § 1852(a)(2). This council, like the other seven Regional Fishery Management Councils established by the Federal Act, is authorized to prepare for submission to the Secretary of Commerce a fishery management plan for any fishery within its geographical area. 16 U.S.C. § 1852(h)(1). Under the Federal Act, the Secretary of Commerce can disapprove such a regional fishery management plan, 16 U.S.C. § 1854(b)(2), and may also prepare a fishery management plan himself if appropriate. 16 U.S.C. § 1854(c). However, the Federal Act does not affect the jurisdiction or authority of any state over fisheries within the state's territorial waters unless and until the Secretary finds that the state has taken action "the results of which will substantially and adversely affect" the implementation of a fishery management plan enacted under the Federal Act. 16 U.S.C. § 1856(b).

Neither the Mid-Atlantic Fishery Management Council nor the Secretary of Commerce has to date adopted a regional or national management plan for the menhaden fishery. Accordingly, that fishery is now subject to the management of each of the coastal states, and, along with New Jersey, the states of New York, New Hampshire, Delaware, Maryland, North Carolina and South Carolina all restrict the geographic areas within which purse seining for menhaden may occur.

In affirming the validity of New Jersey's menhaden regulations, the State Supreme Court observed that complex fisheries regulation such as regulation of the

menhaden fishery should normally fall within the primary jurisdiction of the councils established under state and federal laws, and that the Atlantic States Marine Fisheries Commission should be empowered to resolve "any undue interference by one of the States with the common resource." (Pa 17). However, Ampro has never sought to formally resolve its concerns by challenging any action or inaction by that body. For this reason, and because the decision below is fully consistent with all of the relevant previous decisions of this Court, does not conflict in any way with any decision of the Court of Appeals or of any other state court, and is fact-dependent, Ampro's petition for a writ of certiorari should be denied.

ARGUMENT

Because the New Jersey Supreme Court correctly applied precedents of this Court in finding that the State's menhaden regulations did not violate the Commerce or Supremacy Clauses of the Federal Constitution, and correctly construed the 1905 Compact between New Jersey and Delaware in upholding New Jersey's right to regulate fisheries within its territorial waters of the Delaware Bay and River, and because the decision below does not conflict with any decision by the Court of Appeals or by any other state court, further review by this Court is unwarranted.

At issue in this case is whether a non-discriminatory regulation which prohibits the taking of the menhaden fish for purposes other than for bait within 1.2 miles of New Jersey's shoreline, and which was enacted to further

safety, conservation, and resource allocation interests, imposes an undue burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution. Also raised is whether a 1905 Compact between New Jersey and Delaware now makes any unilateral regulation by either State of fisheries within the Delaware Bay and River invalid, even though during the past 87 years uniform, bi-state laws authorized by the Compact have never been passed. In addition, Ampro raises as an issue the question of whether New Jersey's regulation is preempted by federal navigational and licensing laws and thus invalid under the Supremacy Clause.

No review of any of these issues by this Court is warranted, because in concluding that New Jersey's menhaden regulations did not violate the Commerce Clause and in summarily rejecting Ampro's preemption arguments, the New Jersey Supreme Court did no more than to correctly apply this Court's previous decisions to the facts. The holding of the New Jersey Court is not in conflict with any decision of a Court of Appeals or of any other state court. In addition, the State Supreme Court's ruling that the 1905 Compact between New Jersey and Delaware does not preclude unilateral fisheries regulation by either State within the Delaware Bay and River is completely consistent with a previous decision rendered by a Delaware trial court, has been appropriately followed by the federal district court of the District of Delaware in an interlocutory decision, and correctly construes the straightforward provisions of that Compact. Accordingly, Ampro's petition for a writ of certiorari should be denied. Sup.Ct. Rule 10.

A. The Commerce Clause

Review by this Court to address the New Jersey Supreme Court decision rejecting Ampro's Commerce Clause claims is unwarranted in any respect. This Court has previously held that non-discriminatory state statutes that burden interstate commerce only incidentally do not violate the Commerce Clause unless the burdens imposed on interstate trade are "clearly excessive in relation to the putative local benefits." On the other hand, a state law which regulates interstate commerce directly or discriminates against it on its face or in practical effect must serve a legitimate local purpose that could not be served as well by available non-discriminatory means. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Maine v. Taylor*, 477 U.S. 131, 137 (1986); *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 801 (1992). The New Jersey courts correctly applied these precedents to the facts in determining that New Jersey's menhaden regulations were valid.

The state courts properly concluded on the basis of the record that New Jersey's menhaden regulations were non-discriminatory on their face because they did not distinguish between residents and non-residents and rationally distinguished between the menhaden bait industry and the menhaden reduction industry in which Ampro is engaged. The courts also correctly determined that the administrative record contained no evidence of a discriminatory motive by the promulgators of the regulation and that, as a factual matter, the practical effect of the regulations on interstate commerce was merely incidental. In addition, the state courts rightly found on the basis of the record that the regulations furthered a

number of legitimate state interests, including the enhancement of the breeding grounds for fish which feed on menhaden, the lessening of social and spatial conflict between fishermen, small recreational boats and larger menhaden reduction vessels and purse seines, and conservation of the menhaden fish.

The regulations at issue make absolutely no distinction between residents and non-residents, and therefore on their face are completely neutral and non-discriminatory. Thus, because this Court has repeatedly recognized that state regulations do not discriminate against interstate commerce simply by imposing burdens on all similarly situated persons, even if most of those persons are non-residents, Ampro's claims that the regulations violate the Commerce Clause are erroneous. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987); *Exxon Corp. v. Maryland*, 437 U.S. 117, 125-26 (1978); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1980). *See also Alamo Rent-a-Car v. Sarasota Manatee Airport Auth.*, 906 F. 2d 516, 522 (9th Cir. 1990).

Moreover, the fact that the regulations distinguish between taking menhaden for bait and taking it for other purposes also does not place Ampro or other non-residents at a competitive disadvantage in relation to in-state interests, and thus does not violate the Commerce Clause. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Ampro does not compete against the bait industry in the marketplace, but against other menhaden reduction companies and against the producers of soy beans and other commodities used as oil sources. In addition, and most significantly, Ampro cites no evidence that the regulations it is challenging favor

any such in-state competitors. *Cf. Exxon Corp., supra; Clover Leaf Creamery, supra.*

Additionally, Ampro's assertions that the state regulations effectively increase access to the resource by the bait industry and deny access by the reduction industry are not only irrelevant for Commerce Clause analysis, but are erroneous and were correctly rejected by the state courts. Ampro bases its claims on the fact that the regulations preclude taking menhaden for bait within .6 miles of shore, but prohibit taking menhaden for other purposes within 1.2 miles of shore. However, Ampro ignores the evidence in the record that the vessels currently allowed to take menhaden for bait are fewer in number than the menhaden reduction vessels allowed to fish from 1.2 miles of shore, and that the menhaden bait industry is prohibited by the State's regulations from using the extremely large vessels and purse seine nets which the menhaden reduction industry remains able to use. Second, as is also clear from the record, the primary migratory zone of menhaden is not within 1.2 miles of shore, but within 3 miles of shore (Pa 15; Pa 20 to Pa 22).

Last, Ampro also ignores the evidence in the record that before passage of the regulations, lobster and crab fishermen at times experienced shortages in the availability of menhaden as bait (Pa 22). These shortages demonstrate that there are legitimate reasons for the State to distinguish between the menhaden bait industry and the menhaden reduction industry.

Similarly, Ampro's claims that the regulations have a discriminatory purpose are also without merit and were correctly rejected by the courts below on the basis of the

record. The administrative history of the regulation clearly shows that the regulation was passed to further the legitimate goals of reducing spatial and social conflicts between fishermen, protecting juvenile menhaden, enhancing the breeding grounds of species feeding on menhaden, and making menhaden more readily available as lobster and crab bait. Moreover, the State Division of Fish, Game and Wildlife, the agency that promulgated the regulations, has at no time displayed a discriminatory attitude towards out-of-state interests (Pa 13). As this Court has previously held, the objectives articulated by an administrative body should be assumed to be the actual purposes of a regulation. *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 n.16 (1975); *Minnesota v. Clover Leaf Creamery, supra*, 449 U.S. at 463 n.7, 471 n.15.

Based on these facts, the courts below correctly concluded that New Jersey's menhaden regulations imposed only an incidental burden on interstate commerce, and that this burden was not "clearly excessive in relation to the putative local benefits." As is clearly evident from the record, the regulations lessen local spatial and social conflicts between fishermen and between the large menhaden reduction vessels and nets and small recreational craft, help conserve the menhaden fish by protecting the juvenile menhaden which are found closer to shore, enhance the breeding grounds of the birds and fish which feed on menhaden, and increase the availability of menhaden as lobster and crab bait. Moreover, because the primary fishing zone for menhaden is three miles wide and other coastal states impose similar or more stringent restrictions on Ampro, the regulations do not impose any

type of undue burden on Ampro or other members of its industry.

This Court should not review the factual conclusions of the courts below relating to this issue or the record upon which they were based, which is what Ampro is effectively asking it to do. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984). Similarly, there is no need whatsoever for this Court to review the legal standards that were applied to those facts because the legal standards are well settled and were applied in a manner completely consistent with this Court's previous decisions, the decisions of the Court of Appeals, and the decisions of other state courts. Thus, Ampro's petition for a writ of certiorari should be denied.

B. The 1905 Compact

The New Jersey Supreme Court also did not err in concluding that the 1905 Compact between New Jersey and Delaware does not now render invalid unilateral fisheries regulation by either New Jersey or Delaware within the Delaware Bay and River. The Compact provides in pertinent part:

> Article IV. Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two states, which said commissioners for each state respectively shall, within two years from the

> date of their appointment report to the Legislature of each of said states the proposed laws so framed and recommended by said joint commission. *Upon the adoption and passage of said laws so recommended by the respective Legislatures of said two states,* said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said states. . . . [N.J.S.A. 52:28-38] (Emphasis added).

The Compact further provides:

> Article V. All laws of said states relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery herein above mentioned shall continue in force in said respective states until the enactment of said concurrent legislation is herein provided. [N.J.S.A. 52:28-39].

The New Jersey Supreme Court correctly concluded, as had previously been concluded by the Delaware Superior Court, that the 1905 Compact contains as a condition precedent to any claim of exclusive jurisdiction under it the requirement that commissioners of both New Jersey and Delaware agree to joint regulation, and that the Legislatures of both New Jersey and Delaware then pass the joint laws recommended by those commissioners (Pa 9). However, while New Jersey adopted such laws in 1907, L. 1907, c. 131, Delaware did not, leaving to each State its preexisting jurisdiction over its territorial waters within the Delaware Bay and River. *See Nicoulin v. O'Brien,* 248 U.S. 113 (1918) (holding that the "mere establishment of concurrent jurisdiction" by the Virginia Compact did not

limit Kentucky's power to unilaterally regulate fishing within its boundaries).

Review by this Court of the New Jersey Supreme Court's construction of the 1905 Compact is completely unnecessary. Most importantly, the State Court's construction is in absolute accord with the Compact's plain meaning, as demonstrated by the Compact language quoted above. In addition, the State Supreme Court's interpretation is consistent with the interpretation given to the Compact by a Delaware trial court in 1984. *See State v. Mick*, No. 83-05-0092-93 (Del. Super. Ct. May 2, 1984). Moreover, the State Court's decision has now been followed on an interlocutory basis by the federal district court for the District of Delaware, which on June 19, 1992 denied an application for a temporary restraining order in which it was alleged that Delaware's weakfish rules violated the 1905 Compact because they were not identical to New Jersey's weakfish rules. Memorandum Opinion, *Delaware Watermen's Association, Inc. v. Clark*, No. 92-318-SLR (June 19, 1992) (Pa 25 to Pa 43). Thus, the decision below is in full accord with the decisions of other state and federal courts on this issue.

C. The Supremacy Clause

Finally, the courts below correctly rejected Ampro's claims that New Jersey's regulations were preempted by federal navigational and licensing laws. As this Court has previously held, a state law is not preempted by federal law and does not violate the Supremacy Clause of the

Federal Constitution unless Congress has expressly provided for preemption or has done so implicitly by manifestly evidencing an intent to occupy an entire field and to thereby prohibit any state regulation within the field. Moreover, in the absence of an express congressional intent to preempt State law, it is assumed that preemption should not occur unless the State law actually conflicts with federal law or stands as an obstacle to Congress' objectives in passing the law. *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608, 2617 (1992); *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 203-204 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). The New Jersey Supreme Court correctly concluded that New Jersey was not prevented from adopting the menhaden regulations at issue pursuant to these standards.

The general federal navigational laws cited by Ampro as allegedly preempting New Jersey's menhaden regulations generally regulate which vessel has the right of way when two vessels are using the same waters. However, in passing the navigational laws Congress expressed absolutely no intent whatsoever to eliminate the long-recognized right of any State to manage the fisheries within its territorial waters by regulating when, where and how specific types of fish could be taken from State waters, which is what New Jersey's menhaden rules accomplish. *See Glenovich v. Noerenberg*, 346 F. Supp. 1286, 1292-93 (D. Alaska), aff'd 409 U.S. 1070 (1972). Moreover, in passing general "rules of the road" for vessels, Congress never intended to preclude a crowded state such as New Jersey from managing its fisheries resources so as to lessen conflicts between fishermen in its crowded near

shore waters, a primary reason the State's regulations were passed. *Cf. Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

Furthermore, other federal legislation evidences Congress' firm and continuing intent to allow each State to regulate the taking of fish in State waters, as is being done in this case. Thus, 16 U.S.C. §1856, a provision of the Federal Fisheries Conservation and Management Act of 1976, specifically provides that the Act "shall not be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries," unless the Secretary of Commerce determines after hearing that the State action will adversely affect a fishery management plan adopted under the Act. 16 U.S.C. §1856. Likewise, 16 U.S.C. §3372, a provision of the federal Lacey Act, expressly provides criminal and civil sanctions for any person who imports, exports, transports, sells, receives, acquires or purchases in interstate commerce any fish taken in violation of any State law or regulation. *See also* 16 U.S.C. §3378(a) ("Nothing in this chapter shall be constructed to prevent the several States or Indian tribes from making or enforcing laws or regulations not inconsistent with the provisions of this chapter.").

Based on these Congressional Acts, on the very general nature of the federal "rules of the road," and on the total lack of evidence of any Congressional intent that the "rules of the road" displace traditional State regulation in the area of fisheries management or displace a State's long-recognized ability to respond to local safety concerns within State waters, Ampro's argument that New Jersey's regulations are preempted by federal navigational rules are frivolous at best and were correctly

rejected by the courts below. The State rules in no way conflict with the federal navigational rules or stand as any sort of obstacle to Congress' intent in passing the federal navigational rules, because they do not alter the general navigational standards contained in the federal "rules of the road" for vessels using the same waters at the same time. In addition, New Jersey's rules promote boating safety, and are thus absolutely consistent with Congress' intent in passing the federal navigational rules.

Likewise, Ampro's claims that New Jersey's menhaden regulations are preempted by the federal law relating to federal licensure of vessels, 16 U.S.C. §§12101 to 12112, are also completely baseless. The fact that Ampro's vessels are federally licensed does not render them immune from State laws regulating when, where and how fish may be taken from State waters, because Congress has evidenced absolutely no intention of any kind to prevent long-standing State regulation in that area and has instead expressly recognized the continuing jurisdiction and authority of a State over local fisheries management. 16 U.S.C. §1856; 16 U.S.C. §3372.

In addition, New Jersey's menhaden regulations do not conflict with the federal licensing law insofar as Ampro is concerned, because the State's rules do not regulate in any way the type of vessel or the type of fishing equipment Ampro may use to fish for menhaden. Rather, they simply limit the geographical area within which Ampro may take the fish by purse seine to the 1.8 miles of the three-mile wide State waters that are furthest from shore. Moreover, New Jersey has not denied a State license to any of Ampro's federally licensed vessels, but has simply restricted their operations to the 1.8 miles of

the State's territorial waters furthest from its shore, in light of the crowded nature of the State's near-shore waters and the history of conflicts between fishermen in those waters.

In claiming that New Jersey's regulations are pre-empted by federal navigational laws, Ampro states that the regulatory history and opinions of the New Jersey Supreme Court and Appellate Division show that the purpose of the State's regulations was solely to prevent spatial conflict between recreational and commercial vessels (Pb 8). However, this claim mischaracterizes the decisions below because the New Jersey Supreme Court expressly recognized that the regulations were also passed to enhance the breeding grounds of the bluefish, striped bass and weakfish that feed on menhaden, and described them as "reasonable and even handed conservation measures." (Pa 15 to Pa 16).

Likewise, the opinion of the Appellate Division noted that the conflicts between recreational and commercial fishermen included social as well as spatial tensions and that in addition to reducing those tensions, the regulations were also designed to provide additional protection for the juvenile menhaden found closer to shore, to enable predatory fish and birds to feed more easily closer to shore, and to enhance the availability of menhaden as lobster and crab bait (Pa 21 to Pa 22). The New Jersey Supreme Court affirmed these findings. Thus, the State courts expressly found on the basis of the record that New Jersey's regulations furthered a number of legitimate state interests and that, unlike the federal "rules of the road," they were not simply intended to prevent collisions at sea.

Based on these facts and standards, further review by this court is unnecessary, and Ampro's petition for a writ of certiorari should be denied. The regulations at issue fully meet all pertinent constitutional standards, and those standards were properly identified and applied by the courts below in a manner that is not in conflict with other decisions of federal or state courts. Moreover, this Court should not review the factual conclusions reached below or the facts on which they were based, despite Ampro's invitation that it do so.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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New Jersey
Attorney for Respondents,
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(3)

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No. 92-391

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

AMPRO FISHERIES, INC.,

Petitioners,

v.

JUDITH YASKIN, Commissioner of Environmental Protection; GEORGE HOWARD, Director, Division of Fish, Game and Wildlife; and BRUCE FREEMAN, Administrator, Marine Fisheries Administration,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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REPLY

Ampro Fisheries, Inc. ("Ampro") in its Petition for a Writ of Certiorari to the Supreme Court of New Jersey sought only to lay out the scope of the issues for which it was seeking review, and was not addressing the merits of the case. Ampro, however, wishes to set the record

straight on several misleading statements contained in the State of New Jersey's Brief in Opposition.

First, the State of New Jersey contends that the 1905 Bi-State Compact between New Jersey and Delaware, which requires both states to jointly regulate the Delaware Bay fishery, is a nullity because a "condition precedent" was never met. Specifically, New Jersey alleges that as a "condition precedent" to the Compact having any validity, both New Jersey and Delaware were required to enact the draft uniform laws proposed by the joint commissioners and that while New Jersey enacted such laws, Delaware did not. (Brief in Opposition - p. 17).

While Ampro disagrees that there is any such condition precedent, on the factual issue, New Jersey is incorrect. Both New Jersey (L.1907, c. 131, p. 302) and Delaware (24 Del. Laws, Chapter 146, 1907) enacted the proposed uniform laws in 1907. (A-1a, and 11a respectively.) The uniform laws enacted by both states permitted menhaden purse seiners access to the fisheries in the Delaware Bay. (Delaware, A-18a, Section 20 and New Jersey, A-7a, provision 19). Thus, New Jersey is wrong in its contention that a "condition precedent" was never met where New Jersey and Delaware did, in fact, enact the uniform laws in 1907.

Although both states initially complied with the terms of the Compact by conferring and adopting identical laws, both states thereafter disregarded the Compact and, to the continuing confusion of the fishermen, unilaterally adopted laws in violation thereof.[1]

Moreover, the entire concept of a "condition precedent" is specious and an attempt to mask the true issue. The real focus is whether a state, party to a Bi-State

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1. A specific example is *The Delaware Waterman's Association, Inc., et al. v. Edwin H. Clark, II, et al.,* Civil Action No. 92-318-SLR, (opinion dated June 19, 1992, by Hon. Sue L. Robinson) (A-25) in which New Jersey and Delaware fishermen sued both states, seeking to compel uniformity in accordance with the Compact, as recommended by the Bi-State Commission.

Compact that has been ratified by Congress and has been approved by this Court in settlement of litigation between two states, has the power to unilaterally abandon that Compact, which required concurrent and identical lawmaking, by unilaterally adopting laws in violation thereof.

Second, New Jersey suggests that the Atlantic States Marine Fisheries Commission (the "Atlantic Fisheries Commission") "should be empowered" to resolve any undue interference by one of the states with the common resource. (Brief in Opposition, pp. 9-10.) While Ampro whole-heartedly agrees with New Jersey's suggestion that the Atlantic Fisheries Commission "should be empowered" to resolve problems created by undue interference by one of the states with the common resource, the fact of the matter is, it does not possess such power. Consequently, review of the self-serving activities of the individual states can only be had through the judicial process in this Court.

Third, in its Brief in Opposition, New Jersey contends that because Ampro does not compete against the bait industry in the marketplace it is not disadvantaged in relation to in-state interests and, therefore, there can be no violation of the Commerce Clause. (Brief in Opposition pp. 4, 13). New Jersey's contention is merely an attempt to shift the focus of the essential issue. It is irrelevant whether Ampro competes against the bait industry in the marketplace, Ampro competes against the bait industry for the menhaden catch.

Where the regulation at issue operates to increase access to the menhaden catch for the in-state citizens (the bait industry), but restricts such access to the menhaden catch for out-of-state citizens (the reduction industry), such regulations are discriminatory and if unable to withstand the "strict scrutiny" test must be struck down as violative of the Commerce Clause.

Fourth, New Jersey asserts that preventing a "spacial conflict" was not the sole motive for adopting

the regulations at issue and that there were other legitimate state interests furthered, such as: enhancement of the breeding grounds for fish which feed on menhaden, conserving the menhaden fish by protecting the juvenile menhaden which are found closer to shore, and increasing the availability of menhaden as lobster and crab bait. (Brief in Opposition, pp. 2, 12-15, 22). While these interests were articulated by the State, a review of the record upon consideration of the merits will reveal no actual evidence of such interests. A review of the State's comments on adoption of the regulations reveals: 1) that commercial menhaden fishing is a clean fishery and does not harvest a significant number of fish such as stripped bass, weak fish and blue fish; 2) that while certain fish do feed on the menhaden as the schools migrate past New Jersey's shore, the taking of menhaden does not disrupt the feeding or reproduction of those fish; and 3) that the menhaden stock condition is stable and does not need conservation measures to protect it from over-fishing.

The fact that the state did not place any limits on the number of bait licenses that could be issued, nor did it place any limits on the quantity of menhaden catch that could be taken by the bait industry, further illustrates that the conservation of the menhaden was not a serious motive.

The record is replete with discriminatory intention by the State in adopting the regulations to protect the State's own recreational fishermen. The Supreme Court of New Jersey chose to disregard such discriminatory motives. 13A-14A. While the state may give lip service to legitimate state interests in adopting the regulations at issue, the record will reveal that there is simply no scientific basis to support the regulations nor any motive for adopting the regulations other than to prevent "spacial conflict" between menhaden purse seine fishermen and New Jersey's own recreational fishermen.

For the reasons set forth in the Petition for a Writ of Certiorari to the Supreme Court of New Jersey, this writ should issue.

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX

CHAPTER 131.

An Act providing uniform laws to regulate the catching and taking of fish in the Delaware river and bay between the State of Delaware and the State of New Jersey.

WHEREAS, By virtue of article four of the compact or agreement entitled "A compact between the State of New Jersey and the State of Delaware, relating to the boundary controversy between said States," which was ratified and confirmed by an act of the Legislature of the State of New Jersey, approved March twenty-first, one thousand nine hundred and five, and by an act of the General Assembly of the State of Delaware, approved March twentieth, one thousand nine hundred and five, the State of New Jersey, by an act of the Legislature thereof, approved May eleventh, one thousand nine hundred and five, appointed William J. Bradley, James Strimple and John Boyd Avis commissioners on the part of the State of New Jersey to confer with like commissioners appointed, or to be appointed, by the General Assembly of the State of Delaware, to do and perform all the duties, acts, matters and things required and stipulated in the said compact or agreement; and

WHEREAS, By a similar act of the General Assembly of the State of Delaware, approved March twenty-third, one thousand nine hundred and five, Alexander B. Cooper, William S. Hilles and Walter H. Hayes were appointed like commissioners on the part of the State of Delaware, to confer with the said commissioners on the part of the State of New Jersey, and to do and perform the duties aforesaid; and

WHEREAS, Each of the said commissions have been duly organized as provided and required by law; and

WHEREAS, The said commissioners of the said respective States, in joint meeting held for that purpose, have agreed upon uniform laws to regulate the catching and taking of fish in the Delaware river and bay between

the said States, and have also ascertained the dividing line between the said Delaware river and Delaware bay, and have upon each of the shores of the said two States, where said dividing line extended intersects the same, provided for the erection of a suitable monument to mark said dividing line, in pursuance of the duties imposed upon them by law; therefore

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The provisions of this act shall affect and apply only to the catching and taking of fish in the waters of the Delaware river and bay lying between the States of Delaware and New Jersey.

2. The inhabitants of the States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said river, between low-water marks on each side of said river between said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

3. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either of said States of, in or over the Delaware river, or the ownership of the subaqueous soil thereof, except as is expressly set forth in said compact beweeen the said States; nor shall anything herein contained affect in any way the planting, catching or taking of oysters, clams or other shellfish, or interfere with the oyster industry as now or hereafter carried on under the laws of either of said States.

4. Hereafter it shall be lawful for any person to catch and take from the waters aforesaid fish of any character (except shell-fish) with any net, hook and line, or other appliances; *provided,* the meshes of any net shall not be less than two and one-half inches long, stretched measure, and except as hereinafter provided; *provided further,* that nothing in this section shall apply to nets used for catching eels.

5. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, shad from the waters aforesaid with a seine or net of any character the meshes of which shall be less than five and one-quarter inches, stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any shad from the said waters, in any manner whatsoever, between the hours of twelve o'clock noon of every Saturday and twelve o'clock midnight of the Sunday next ensuing, and also between the fifth day of June in each and every year and the first day of March thence next ensuing. It shall also be unlawful for any person at any time to set, place or use a net of any kind, except a drifting net, for the purpose of catching and taking shad within one-half mile of the mouth of any river, creek or stream emptying into the said waters.

6. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, carp from the waters aforesaid with a seine or net of any character the meshes of which shall be less than two and one-half inches, stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, from the said waters any carp, in any manner whatsoever, between the hours of twelve o'clock noon of every Saturday and twelve o'clock midnight of the Sunday next ensuing. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid any carp weighing less than one pound; and should any such fish be caught it shall be immediately returned to the waters, uninjured. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any carp, in any manner whatever, between the first day of May and the tenth day of August of each and every year.

7. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, rockfish from the waters aforesaid with a seine or net of any kind, the meshes of which shall be less than two and one-half

inches, stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any rockfish in any manner whatsoever between the hours of twelve o'clock noon of every Saturday and twelve o'clock midnight of the Sunday next ensuing. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid, in any manner whatever, any rockfish weighing more than twenty pounds or measuring less than ten inches in length; and should any such fish, weighing over twenty pounds, or measuring less than ten inches in length, be caught, it shall be immediately returned to the waters, uninjured.

8. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid, any sturgeon or mamoose with a net of any character, the meshes of which shall be less than thirteen inches, stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch or take, any sturgeon or mamoose under six feet in length, and if any such sturgeon or mamoose under six feet in length should be caught, it shall be immediately returned to the waters, uninjured. It shall also be unlawful for any person to catch and take, or attempt to catch and take, sturgeon or mamoose from the waters aforesaid, in any manner whatever, between the hours of twelve o'clock noon of every Saturday and twelve o'clock midnight of the Sunday next ensuing, and also between the first day of July in each and every year and the first day of March thence next ensuing.

9. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid, any trout or weakfish with a net of any character, the meshes of which shall be less than two and one-half inches, stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch or take, any trout or weakfish from the waters aforesaid, with a net of any character, between the hours

of twelve o'clock noon of every Saturday and twelve o'clock midnight of the Sunday next ensuing.

10. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, fish of any kind with a net of any character which is anchored, staked or fastened down in any way across the said waters or any part thereof, or at right angles with the shore line thereof, or across the mouth of any river, creek or stream emptying into the waters aforesaid.

11. Hereafter it shall be unlawful for any persons by boat, anchor, dredge, or otherwise, in the waters aforesaid, to willfully and without reasonable cause, interfere with, break, damage or destroy any drift net or gill seine being lawfully used for the taking of any fish as herein provided.

12. Hereafter it shall be unlawful for any person willfully to put or place in the waters aforesaid any explosive substance whatever, or any drug or poisoned bait for the purpose of catching and taking, killing or injuring the fish, or to allow any dye stuff, coal or gas tar, coal oil, sawdust, tan bark, coculus indicus (otherwise known as fish-berries), lime, refuse from gashouses, oil tanks or vessels, or any other deleterious, destructive or poisonous substance to be turned into or allowed to run into any of the waters aforesaid, in quantities sufficient to destroy or impair fish life or disturb the habits of fish inhabiting the same. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit and pay a fine of not more than five thousand dollars, or shall be imprisoned not more than one year, or both, in the discretion of the court.

13. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, fish of any kind or description from the waters aforesaid by a net of any character on the Sabbath day, commonly called Sunday.

14. Hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, fish of

any kind from the waters aforesaid with a set line, or to have, use, erect or maintain in the waters aforesaid, for the purpose of catching and taking fish of any kind (except catfish, eels and suckers), any fish basket, eel weir, fyke net, pound net, shore net, dip net, cast net, wing-wall, wingdams, or any other device, excepting in the manner and with the means in this act provided; *provided,* that nothing contained in this section shall prevent the catching and taking of carp with shore nets, dip nets, or cast nets.

15. Hereafter it shall be unlawful for any person to sell, expose for sale or have in possession, any fish caught and taken in violation of the provisions of this act.

16. Any person or persons violating any of the provisions of this act in all cases where no other specific penalty is herein provided, shall forfeit and pay a fine of not less than twenty dollars nor more than two hundred dollars and costs of prosecution, and in default of payment thereof shall be committed to the county jail or work-house for a period of not less than ten days nor more than ninety days, or until such fine and costs are paid.

17. Any and every boat, vessel, net, trap, pot, pound, set line, fyke, weir or other property used by any person for the unlawful taking of, or attempting to take, any fish in the waters aforesaid, in violation of the provisions of this act, shall be forfeited to the State of New Jersey, together with the tackle, apparel and furniture of said boat or vessel and all other apparatus and implements so unlawfully used; and the same shall be seized and detained by the sheriff, officer, any constable or any fish and game warden of the State, or authorized deputy or deputies, until sold or discharged, as hereinafter provided. Upon the conviction of any such person as aforesaid, the court shall, in addition to the sentence pronounced against such person, enter an order and judgment of forfeiture against said property so unlawfully used and shall order the sheriff of the county, or

any fish and game warden of the State, to at once seize the same wheresoever it may be found, who shall thereupon advertise and sell the same at public auction, for cash, to the highest and best bidder for the same, after giving at least ten days' notice by advertisements, posted in at least ten public places of the county, of the time and place of said sale; the proceeds of said sale, after deducting all costs, charges and expenses, shall be paid by the said sheriff or fish and game warden to the Board of Fish and Game Commissioners for the use of said commission according to law. In the event that the said person, so charged as aforesaid, shall be acquitted, the said property shall be forthwith returned to the person in whose custody it was at the time it was so seized and taken as aforesaid.

18. Any justice of the peace, or other officer legally qualified by law, shall, upon affidavit made that any person, boat, vessel or other appliance or apparatus hereinbefore enumerated, is, are or have been violating, or used in violation of this act, issue his warrant to the sheriff or any constable of the county or any fish and game warden of the State, authorized to make such arrest, commanding him to arrest such person and to seize and detain such property for hearing, trial or other proceeding under this act. The said sheriff, constable, officer or fish and game warden, may, if necessary, summon to his aid the posse comitatus, and may require the assistance and use of any other boat, vessel or other means, by paying, or tendering, just compensation. It shall not be necessary that the affidavit shall state the name of the boat or vessel, or describe with particularity the property to be seized.

19. It shall be unlawful for any person to catch and take, or to attempt to catch and take, from the said Delaware river or Delaware bay, with purse or shirred nets operated by or from steam or other vessels, fish of any kind whatsoever; *provided, however,* that this section shall not apply to the catching and taking of menhaden, sharks, porpoises and herring-hogs, by the

crews of vessels licensed as provided for in this section. It shall be the duty of the Fish and Game Commission of the State, upon the payment to it annually of the sum of one hundred dollars ($100) for each and every vessel or boat, to issue a license to such vessel or boat to catch and take menhaden, sharks, porpoises and herring-hogs in the waters of the Delaware bay as far north as a straight line drawn from the center of the mouth of Mahon's river to the nearest point opposite on the New Jersey shore, from the first day of June until the thirty-first day of August, inclusive, of each year, and at no other time or times. The said money so received for said license shall be paid over to the Fish and Game Commission of the State for the use of said commission as provided by law.

20. It shall be unlawful for any person to have in his possession or to bring into this State any fish generally known as edible or food fish that has been caught and taken from the waters of the Delaware bay or river within the bounds aforesaid, for the purpose of extracting oil therefrom or of converting said fish into fertilizer; and it shall also be unlawful for any person to extract oil, or to convert, or in any manner assist in extracting oil from or in converting such fish into fertilizer.

21. Any fish commissioner, fish and game warden, sheriff, constable, or any officer may, upon view, arrest any person violating any of the provisions of this act without warrant or writ issued for such purpose.

22. Each of the said States of Delaware and New Jersey shall also have concurrent jurisdiction over all offenses and violations of this act committed or attempted to be committed by any person who is not an inhabitant of either of said States.

23. The Governor of the State of Delaware shall, when and as requested by the Governor of the State of New Jersey, issue a commission or commissions to such person or persons as may be named to him by the Governor of the State of New Jersey, which shall authorize the person or persons to whom the same are directed to arrest the inhabitants of either the State of

Delaware or the State of New Jersey for any violation of this act; *provided, however,* that if the person so arrested shall be an inhabitant of the State of Delaware, such person shall be forthwith taken to the State of Delaware for trial and punishment. The Governor of the State of Delaware at any time shall, when and as requested by the Governor of this State, revoke the said commissions, or any of them. The compensation of the person or persons to whom such commission or commissions may be directed shall be paid wholly by the State of New Jersey.

The Governor of the State of New Jersey shall, when and as requested by the Governor of the State of Delaware, issue a commission or commissions to such person or persons as may be named to him by the Governor of the State of Delaware, which shall authorize the person or persons to whom the same are directed to arrest the inhabitants of either the State of Delaware or the State of New Jersey, for any violation of this act; *provided, however,* that if the person so arrested shall be an inhabitant of the State of New Jersey, such person shall be forthwith taken to the State of New Jersey for trial and punishment. The Governor of this State may, at any time, and shall, when and as requested by the Governor of the State of Delaware, revoke the said commissions, or any of them. The compensation of the person or persons to whom such commission or commissions may be directed shall be paid wholly by the State of Delaware.

Nothing contained in this section shall be so construed as to prevent the arrest of any inhabitant of the State of New Jersey by any other officer or person having authority under the laws of the said State of New Jersey to make arrests for the violation of the provisions of this act.

24. The provisions of this act where the offense is designated as a misdemeanor shall be enforced in accordance with the provisions of the statutes of the State relating to misdemeanors and in all other cases shall be enforced in accordance with the provisions of an act

entitled "An act to provide a uniform procedure for the enforcement of all laws relating to fish, game and birds, and for the recovery of penalties for violations thereof," approved March twenty-ninth, one thousand eight hundred and ninety-seven, and the supplements thereto and acts amendatory thereof.

25. This act shall take effect immediately, but shall not become operative until the Legislature of the State of Delaware shall have passed, and the Governor of that State shall have approved of a similar law, agreed upon by the commission, as recited in the preamble of this act. The provisions in this act contained regulating the size of the meshes of fishing nets shall not become operative until October first, one thousand nine hundred and eight.

26. All laws, or parts of laws, inconsistent with the provisions of this act, be and the same are hereby repealed.

Approved May 7, 1907.

CHAPTER 146.

OF FISH, OYSTERS AND GAME

AN ACT Providing Uniform Laws to Regulate the Catching and Taking of Fish in the Delaware River and Bay between the State of Delaware and the State of New Jersey.

Whereas, By virtue of Article IV of the compact or agreement entitled a "Compact Between the State of New Jersey and the State of Delaware, Relating to the Boundary Controversy Between said States," which was ratified and confirmed by an Act of the General Assembly of the State of Delaware, approved March 20th, 1905, and by an Act of the Legislature of the State of New Jersey, approved March 21st, 1905, the State of Delaware by an Act of the General Assembly thereof, approved March 23rd, 1905, appointed Alexander B. Cooper, William S. Hilles and Walter H. Hayes, Commissioners on the part of the State of Delaware to confer with like Commissioners appointed, or to be appointed, by the Legislature of the State of New Jersey, to do and perform all the duties, acts, matters and things required and stipulated in the said Compact or Agreement; and

Whereas, By a similar Act of the Legislature of the State of New Jersey, approved May 11th, 1905, William J. Bradley, John Boyd Avis and James Strimple were appointed like Commissioners, on the part of the State of New Jersey, to confer with the said Commissioners on the part of the State of Delaware, and to do and perform the duties aforesaid; and

Whereas, Each of the said Commissions have been duly organized as provided and required by law; and

Whereas, The said Commissioners of the said respective states, in joint meeting held for that purpose, have agreed upon uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between the said states, and have also ascertained the dividing line between the said Delaware River and Delaware Bay, and have upon each of the shores of the

said two states where said dividing line extended intersects the same, provided for the erection of a suitable monument to mark said dividing line, in pursuance of the duties imposed upon them by law; therefore.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Section I. That the provisions of this Act shall affect and apply only to the catching and taking of fish in the water of the Delaware River and Bay lying between the States of Delaware and New Jersey.

Section 2. That the inhabitants of the State of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said river between low water marks on each side of said river between the said states, except so far as either state may have heretofore granted valid and subsisting private rights of fishery.

Section 3. That nothing herein contained shall affect the territorial limits, rights or jurisdiction of either of said states of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as is expressly set forth in said Compact between the said states; nor shall anything herein contained affect in any way the planting, catching or taking of oysters, clams, or other shell fish, or interfere with the oyster industry, as now or hereafter carried on under the laws of either of said states.

Section 4. That hereafter it shall be lawful for any person to catch and take, from the waters aforesaid, fish of any character (except shell fish) with any net, hook and line, or other appliances; provided the meshes of any net shall not be less than two and one-half inches long stretched measure, and except as hereinafter provided; provided further, that nothing in this Section shall apply to nets used for catching eels.

Section 5. That hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, shad from the waters aforesaid with a seine or net

of any character, the meshes of which shall be less than five and one-quarter inches stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any shad from the said waters in any manner whatsoever between the hours of twelve o'clock midnight of every Saturday and twelve o'clock midnight of the Sunday next ensuing, and also between the fifth day of June in each and every year and the first day of March thence next ensuing. It shall also be unlawful for any person at any time to set, place or use a net of any kind, except a drifting net, for the purpose of catching and taking shad within one-half mile of the mouth of any river, creek or stream emptying into the said waters.

Section 6. That hereafter it shall be unlawful for any person to catch and take, or attempt to catch and take, carp from the waters aforesaid with a seine or net of any character, the meshes of which shall be less than two inches stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, from the said waters any carp in any manner whatsoever, between the hours of twelve o'clock midnight of every Saturday and twelve o'clock midnight of the Sunday next ensuing. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid, any carp weighing less than one pound, and should any such fish be caught, it shall be immediately returned to the waters uninjured. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any carp in any manner whatever between the first day of May and the tenth day of August of each and every year.

Section 7. That hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, rock fish from the waters aforesaid, with a seine or net of any kind, the meshes of which shall be less than two inches stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any rock fish in any manner whatsoever

between the hours of twelve o'clock midnight of every Saturday and twelve o'clock midnight of the Sunday next ensuing. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid, in any manner whatever, any rock fish weighing more than twenty pounds, and should any such fish weighing over twenty pounds be caught, it shall be immediately returned to the waters uninjured.

Section 8. That hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid, any sturgeon or mamoose with a net of any character, the meshes of which shall be less than thirteen inches stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any sturgeon or mamoose under six feet in length, and if any such sturgeon or mamoose under six feet in length should be caught it shall be immediately returned to the waters uninjured. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, sturgeon or mamoose from the waters aforesaid, in any manner whatsoever, between the hours of twelve o'clock noon of every Saturday and twelve o'clock midnight of the Sunday next ensuing, and also between the first day of July in each and every year and the first day of March thence next ensuing.

Section 9. That hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, from the waters aforesaid, any trout or weak fish with a net of any character, the meshes of which shall be less than two inches stretched measure. It shall also be unlawful for any person to catch and take, or to attempt to catch and take, any trout or weak fish from the waters aforesaid, with a net of any character, between the hours of twelve o'clock midnight of every Saturday and twelve o'clock midnight of the Sunday next ensuing.

Section 10. That hereafter it shall be unlawful for any person to catch and take or to attempt to catch and take, fish of any kind with a net of any character which

is anchored, staked or fastened down in any way across the mouth of any river, creek or stream emptying into the waters aforesaid.

Section 11. That hereafter it shall be unlawful for any person by boat, anchor, dredge, or otherwise, in the waters aforesaid, to willfully and without reasonable cause, interfere with, break, damage, or destroy any drift net or gill seine being lawfully used for the taking of any fish as herein provided.

Section 12. That hereafter it shall be unlawful for any person willfully to put or place in the waters aforesaid any explosive substance whatever, or any drug or poisoned bait for the purpose of catching and taking, killing or injuring the fish, or to allow any dye stuff, coal or gas tar, coal oil sawdust, tan bark, coculusindicus (otherwise known as fish berries), lime refuse from gas houses, oil tanks or vessels, or any other deleterious, destructive or poisonous substance to be turned into or allowed to run into any of the waters aforesaid, in quantities sufficient to destroy or impair fish life or disturb the habits of fish inhabiting the same. Any person violating any of the provisions of this Section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit and pay a fine of not more than five thousand dollars, or shall be imprisoned not more than one year, or both, in the discretion of the court.

Section 13. That hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, fish of any kind or description from the waters aforesaid by a net of any character on the Sabbath Day, commonly called Sunday.

Section 14. That hereafter it shall be unlawful for any person to catch and take, or to attempt to catch and take, fish of any kind from the waters aforesaid with a set line, or to have, use, erect or maintain in the waters aforesaid, for the purpose of catching and taking fish of any kind (except cat fish, eels and suckers), any fish basket, eel, weir, fyke net, pound net, shore net, dip net,

cast net, wing-wall, wing-dams, or any other device, excepting in the manner and with the means in this Act provided. Provided, that nothing contained in this section shall prevent the catching and taking of carp with shore nets, dip nets or cast nets.

Section 15. That hereafter it shall be unlawful for any person to sell, expose for sale, or have in possession, any fish caught and taken in violation of the provisions of this Act.

Section 16. Every violation of any of the provisions of this Act shall be deemed a misdemeanor, and upon conviction thereof, where no other specific penalty is herein provided, each offender shall forfeit and pay to the State of Delaware a fine of not less than twenty dollars nor more than two hundred dollars, and costs of prosecution, and in default of payment thereof shall be committed to the county jail, or workhouse, for a period of not less than ten days nor more than ninety days, or until such fine and costs are paid.

Section 17. Any and every boat, vessel, net, trap, pot, pound, set line, tyke, weir, or other property used by any person for the unlawful taking of, or attempting to take, any fish in the waters aforesaid, in violation of the provisions of this Act, shall be forfeited to the State of Delaware, together with the tackle, apparel and furniture of said boat or vessel, and all other apparatus and implements so unlawfully used; and the same shall be seized and detained by the sheriff, officer, or any county constable, or authorized deputy or deputies, until sold or discharged, as hereinafter provided. Upon the conviction of any such person, as aforesaid, the court shall, in addition to the sentence pronounced against such person, enter an order and judgment of forfeiture against said property so unlawfully used and shall order the sheriff of the county to at once seize the same wheresoever it may be found, who shall, thereupon, advertise and sell the same at public auction, for cash, to the highest and best bidder for the same, after giving at least ten days notice by advertisements posted in at least ten

public places of the county, of the time and place of said sale; the proceeds of said sale, after deducting all costs, charges and expenses, shall be paid by the said sheriff to the State Treasurer for the use of the State. In the event that the said person, so charged as aforesaid, shall be acquitted, the said property shall be forthwith returned to the person in whose custody it was at the time it was so seized and taken as aforesaid.

Section 18. Any Justice of the Peace, or other committing officer, shall, upon affidavit made that any person, boat, vessel, or other appliance or apparatus hereinbefore enumerated, is, are or have been violating, or used in violation of, this Act, issue his warrant to the sheriff, county constable, or officer, of the county, authorized to make such arrest, commanding him to arrest such person and to seize and detain such property for hearing, trial, or other proceeding under this Act. The said sheriff, constable or officer, may, if necessary, summon to his aid the posse comitatus, and may require the assistance and use of any other boat, vessel, or other means, by paying, or tendering, just compensation. It shall not be necessary that the affidavit shall state the name of the boat or vessel, or describe with particularity the property to be seized.

Section 19. That the costs, charges and expenses of any proceeding for the violation of the provisions of this Act, shall be taxed and allowed as follows:

To any sheriff, constable, or officer, for each day actually engaged in seizing the said property, five dollars ($5.00);

To every person summoned by and rendering aid to such sheriff or constable, for each day actually engaged in assisting in seizing said property, two dollars ($2.00);

To every Justice of the Peace, sheriff, constable, officer, witness, or other person performing service under this Act and not herein specifically mentioned, the same fees as are now provided by law for similar services. Said costs, charges and expenses shall be paid by the officer making the sale out of the proceeds

thereof; or if the property be not so sold, then by the State Treasurer upon the certificate of the court or Justice of the Peace, or committing officer, before whom the proceedings were had.

That the General Assembly shall appropriate at least the sum of two hundred dollars per annum for the purpose of paying the costs and charges incurred under the provisions of this Act.

Section 20. That it shall be unlawful for any person to catch and take, or to attempt to catch and take, from the said Delaware River or Delaware Bay, with purse or shirred nets operated by or from steam or other vessels, fish of any kind whatsoever; provided, however, that this section shall not apply to the catching and taking of menhaden, sharks, porpoises, and herring-hogs, by the crews of vessels licensed as provided for in this section. It shall be the duty of the Collector of Oyster Revenue, upon the payment to him annually of the sum of one hundred dollars ($100.00) for each and every vessel or boat, to issue a license to such vessel or boat to catch and take menhaden, sharks, porpoises and herring-hogs in the waters of the Delaware Bay as far north as a straight line drawn from the centre of the mouth of Mahon's River to the nearest point opposite on the New Jersey shore from the first day of June until the thirty-first day of October, inclusive, of each year, and at no other time or times. The said money so received for said license shall be paid over to the State Treasurer for the use of the state.

Section 21. It shall be unlawful for any person to have in his possession or to bring into this state any fish generally known as edible or food fish that has been caught and taken from the waters of the Delaware Bay or River within the bounds aforesaid, for the purpose of extracting oil therefrom, or of converting said fish into fertilizer; and it shall also be unlawful for any person to extract oil or to convert, or in any manner assist in extracting oil from, or in converting such fish into fertilizer.

Section 22. That any Fish Commissioner, Collector of Oyster Revenue, Sheriff, Constable, or any officer may, upon view, arrest any person violating any of the provisions of this Act without warrant or writ issued for such purpose.

Section 23. That all prosecutions from the violation of any of the provisions of this Act, unless otherwise herein specially provided, shall be had in like manner, under similar process and proceeding, under the same restrictions and with the same privileges and rights and before the same court or officer as is now, or shall hereafter be, provided by the laws of the State of Delaware for other misdemeanors, or violations of this law.

Section 24. That each of the said States of Delaware and New Jersey shall also have concurrent jurisdiction over all offenses and violations of this Act committed, or attempted to be committed, by any person who is not an inhabitant of either of said states.

Section 25. The Governor of the State of Delaware shall, when and as requested by the Governor of the State of New Jersey, issue a commission or commissions to such person or persons as may be named to him by the Governor of the State of New Jersey, which shall authorize the person or persons to whom the same are directed to arrest the inhabitants of either the State of Delaware or the State of New Jersey for any violation of this Act, provided, however, that if the person so arrested shall be an inhabitant of the State of Delaware, such person shall be forthwith taken to the State of Delaware for trial and punishment. The Governor of this State may, at any time, and shall, when and as requested by the Governor of the State of New Jersey revoke the said commissions, or any of them. The compensation of the person or persons to whom such commission or commissions may be directed shall be paid wholly by the State of New Jersey.

The Governor of the State of New Jersey shall, when and as requested by the Governor of the State of Delaware, issue a commission or commissions to such person or persons as may be named to him by the Governor of the State of Delaware, which shall authorize the person or persons to whom the same are directed to arrest the inhabitants of either the State of Delaware or the State of New Jersey for any violation of this Act, provided, however, that if the person so arrested shall be an inhabitant of the State of New Jersey, such person shall be forthwith taken to the State of New Jersey for trial and punishment. The Governor of the State of New Jersey may, at any time, and shall, when and as requested by the Governor of the State of Delaware, revoke the said commissions, or any of them. The compensation of the person or persons to whom such commission or commissions may be directed shall be paid wholly by the State of Delaware.

Nothing contained in this section shall be so construed as to prevent the arrest of any inhabitant of the State of Delaware by any other officer or person having authority under the laws of the said State of Delaware to make arrests for the violation of the provisions of this Act.

Section 26. This Act shall not become operative until the Legislature of the State of New Jersey shall have passed, and the Governor of that State shall have approved of a similar law, agreed upon by the Commission, as recited in preamble of this Act.

The provisions in this Act contained regulating the size of the meshes of fishing nets shall not become operative until October 1, 1908.

Section 27. That all laws, or parts of laws, inconsistent with the provisions of this Act, be and the same are hereby repealed.

Approved April 23, A. D. 1907.